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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

VOL. VII JUNE 1935 No. 5

JURISDICTION TO GRANT DIVORCES

ROBERT A. LEFLAR*

Since *Haddock v. Haddock*[1] was decided, much has been written[2] concerning the jurisdiction of states to grant divorces, and the extent to which such divorces once granted should receive recognition in other states. Lack of agreement has been a principal feature of the writing, and the courts in deciding the cases have emulated the law review writers in that respect at least. The most recent attempt to solve the problem appears in the American Law Institute's Restatement of Conflict of Laws.[3] It is possible that the Restatement's solution will put to ultimate rest all the noisy doubts that have beset the legal profession since the Haddock opinion was handed down; or it may not. At any rate, it affords excuse for further discussion.

Prior to 1906, it was generally thought that the problem as to jurisdiction to grant divorces was fairly well settled, whether satisfactorily settled or not. An action for divorce was deemed an action *in rem,* the marital status being the *res.*[4] It was deemed a local and not a transitory

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[1]201 U. S. 562 (1906).

[2]See Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Schofield, *The Doctrine of Haddock v. Haddock* (1906) 1 ILL. L. REV. 219; Peaslee, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457; Richards, *The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce* (1920) 15 ILL. L. REV. 259; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; Greene, *The Enforcement of Foreign Divorce Decrees in New York* (1926) 11 CORN. L. Q. 141; Walton, *International Migratory Divorces* (1927) 21 ILL. L. REV. 435; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564; Parks, *Some Problems in Jurisdiction to Divorce* (1929) 13 MINN. L. REV. 525; Vreeland, *Mr. and Mrs. Haddock* (1934) 20 AMER. BAR ASSN. J. 568; Comment (1925) 44 YALE L. J. 488; Annotations, 39 A. L. R. 603 (1925); 86 A. L. R. 1329 (1933).

[3]RESTATEMENT, CONFLICT OF LAWS (1934) § 113.

[4]STORY, CONFLICT OF LAWS (1st ed., 1934) § 229-230b; MINOR, CONFLICT OF LAWS (1901) 195-206; RORER, INTERSTATE LAW (1879) 180; WHARTON, CONFLICT OF LAWS (1st ed., 1872) 217; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1st ed., 1891) § 837. *Cf.* DICEY, CONFLICT OF LAWS (1896) 269 (and see Moore's American Notes, at p. 283); WESTLAKE, PRIVATE INTERNATIONAL LAW (4th ed., 1905) 85. And see Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, 418.

action, one that could be brought only where the *res* was present. And the *situs* of the res was inextricably bound up with the domicile of the parties, so that it was always present at that domicile, and nowhere else. True, with the growth of modern ideas as to freedom of women, particularly in the United States, and the resultant allowing of married women to set up domiciles separate from those of their husbands under some circumstances,[5] it was conceded that the *res* (the marital status) might be split in two pieces, so as to be located in two places at one time. But this was not thought to affect materially the original *in rem* concept of divorce jurisdiction; if the *res* was at two places at once, that only meant that there were two places competent to exercise jurisdiction over it. A divorce granted at either place was deemed a valid divorce.[6]

Of course, some unfairness to parties was bound occasionally to arise from the operation of this concept of divorce jurisdiction. Sometimes divorces would be granted at the suit of one party without any actual notice to the other party at all.[7] Sometimes the action would be brought at a place so far away from the home of the defendant that there would be small opportunity to present otherwise available defenses to the action.[8]

[5]Cheever v. Wilson, 9 Wall. (U. S.) 108 (1869); Williamson v. Osenton, 232 U. S. 619 (1914); Ditson v. Ditson, 4 R. I. 87 (1856). And see Beale, *The Domicile of a Married Woman* (1917) 2 SOUTHERN L. Q. 93; Parks, *The Domicile of a Married Woman* (1923) 8 MINN. L. R. 28; GOODRICH, CONFLICT OF LAWS (1927) 44.

[6]Thompson v. Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443 (1890); Hilbish v. Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783 (1896); Van Orsdal v. Van Orsdal, 67 Iowa 35, 24 N. W. 579 (1885); Chapman v. Chapman, 48 Kans. 636, 29 Pac. 1071 (1892); Rodgers v. Rodgers, 56 Kans. 483, 43 Pac. 779 (1896); Benton's Succession, 106 La. 494, 31 So. 123, 59 L. R. A. 135 (1901); Anthony v. Rice, 110 Mo. 223, 19 S. W. 243 (1892); Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055 (1893); Ditson v. Ditson, *supra,* note 5; Thoms v. King, 95 Tenn. 60, 31 S. W. 983 (1895); Shafer v. Bushnell, 24 Wis. 372 (1869). See GOODRICH, CONFLICT OF LAWS (1927) 296. It is true that some states recognized the validity of a foreign divorce at the domicile of one party for limited purposes only. See People v. Baker, 76 N. Y. 78 (1879). Nearly all of the cases cited in this note involve the recognition of divorce decrees of other states. It is wholly unnecessary to accumulate case in which courts upheld their own jurisdiction to grant divorces, on the *in rem* theory, when only the plaintiff was domiciled in the state. Such cases were legion.

[7]As in the famous case of Maynard v. Hill, 125 U. S. 190 (1888), in which H and W, a husband and wife had been domiciled together in Ohio, when H left W, going to California, then to Oregon Territory, where, his presence there being wholly unknown to her, he two years later (in 1852) secured a legislative divorce from W, without any notice to W whatever, and without any constructive service having much tendency to give actual notice. Later, after H's death, W made a claim to his Oregon lands, as being still his wife, and the United States Supreme Court held that the divorce was valid. Though this was a case of legislative divorce, it is usually cited as illustrating operation of the *in rem* theory of divorce jurisdiction, where the *res* is divided. See Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586, 592; Comment (1935) 44 YALE L. J. 488, 492.

[8]Occasionally a defendant seeks at his domicile to enjoin the maintenance of the foreign divorce suit for this reason, though such injunction proceedings would usually be unsuccessful unless it were found that a fictitious domicile was being made the basis of the divorce action, as in Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 58 L. R. A. 484 (1902); s. c., 58 N. J. Eq. 94, 43 Atl. 97 (1899).

Sometimes the object of one of the spouses in establishing a new domicile would be to take advantage of the more lenient divorce laws of the place in which the new domicile was established. All these possibilities, and others, represented evils in current practice, and they were extremely objectionable, Furthermore, they were evils directly attributable to the underlying theory of divorce jurisdiction, the concept of the divorce action as an action *in rem,* with the marital status as the *res.* As long as that theory was followed, actual notice to non-resident defendants was unnecessary; the requirements of due process were satisfied by any form of constructive service having a reasonable tendency to give notice of the pending suit. Even a notice posted on the courthouse door in the state and county where suit was brought might be held to satisfy that requirement.[9] However soundly this theory might operate in cases in which the *res* which was the subject of the action was a tangible thing—land or chattel—over which the absent owner exercises a fairly constant measure of supervision and control, so that he would be apt to learn promptly of the institution of legal proceedings against the thing, there surely were many cases in which an absent spouse, separated justifiably or unjustifiably from the suing mate, would or could have no information whatever as to the latter's dealings with that portion of the *res* which was at his domicile.

Perhaps the only sound method of eliminating these admitted evils was by changing the theory of the nature of a divorce action, from one *in rem* to one *in personam,* or perhaps partly *in rem* and partly *in personam,* so as to increase the rather vague assurances of notice and opportunity to defend which accompany actions purely *in rem.* This idea may or may not have been presented to American courts sitting in the late nineteenth and early twentieth centuries; at least, they did not follow it.

The decision of the Supreme Court of the United States in *Atherton v. Atherton*[10] served only to buttress this firm respect for the underlying *in rem* theory. In that case, a husband and wife were domiciled together in Kentucky, then the wife properly established a separate domicile in New York. The husband brought action in Kentucky, on constructive service, and was there granted a divorce. Later, the wife sued in New York for a divorce from bed and board, and the decree was in her favor, rejecting the husband's contention that New York was required to give full faith and credit to the Kentucky decree. The United States Supreme Court reversed the New York decision, holding the Kentucky decree valid not only in Kentucky but in New York also, not only as to the

[9]The usual statutory forms of constructive service are by mailing notice to the last known address of the non-resident defendant, or by publishing the notice in a local newspaper. See Ballard v. Hunter, 204 U. S. 241 (1906) for an extreme case in which an apparently questionable form of constructive service was upheld.

[10]181 U. S. 155 (1901).

husband but as to the wife also. There then seemed little doubt but that the underlying theory was a firm foundation upon which the divorce law of the nation safely could be built. But in 1906 the Supreme Court handed down its decision in *Haddock v. Haddock*,[11] and it was seen that the firm foundation supported a Tower of Babel.[12]

The facts of the Haddock case are so well known as scarcely to require restatement. A husband and wife were domiciled in New York. The husband left the wife, and later established his domicile in Connecticut, where he secured a divorce based on contructive service on the absent wife. Later, the wife sued in New York for a divorce from bed and board, the husband setting up the prior Connecticut decree as a defense, but this time the United States Supreme Court, by a 5-4 decision, held that New York need give no faith or credit to that decree. Nor was this intended to be an overruling of the Atherton case, for the majority in the Haddock case expressly distinguished the earlier decision on the ground that in it the divorce was granted at the place which was the last matrimonial domicile of the married pair.[13] Furthermore, the holding in the Atherton case has since been reaffirmed.[14]

Severe criticism was immediately directed against the Haddock decision. Professor Beale's strictures[15] were characteristic. He pointed out that the object of the court was a praiseworthy one: To make objectionable divorces less easy to obtain. But he insisted that the decision would have an effect directly the opposite of that desired. In the first place, Beale considered it fundamental that if the court rendering the first decree had jurisdiction, its decree would be absolutely entitled to full faith and credit; if the decree was not entitled to full faith and credit, it must be because of some absence of jurisdiction in the court rendering it. All this the Haddock case denied, saying the decree might be good in Connecticut, yet not entitled to full faith and credit elsewhere, thus declaring that parties could be unmarried in one state and at the same moment still be married in another, or one party still married to another unmarried. He

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[11]201 U. S. 562 (1906).

[12]Genesis 11:9—"Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth . . ."

[13]201 U. S. 562, 584 (1906). For discussions of the concept of matrimonal domicile, see Goodrich, *Matrimonial Domicile* (1917) 27 YALE L. J. 49; Harding, *Matrimonial Domicile and Marital Rights in Movables* (1932) 30 MICH. L. REV. 859.

[14]Thompson v. Thompson, 226 U. S. 551 (1913).

[15]Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586: "The Supreme Court of the United States has on the whole been the most highly esteemed court of the land from the professional point of view. It has occasionally delivered an opinion which was questioned by many members of the bar . . . It has remained for the present Court to astonish the whole bar of the country . . . The decision then is opposed to reason, to authority, and to morality; but it will stand until the question is raised again. As Mr. Justice Holmes said in his dissenting opinion, civilization will not come to an end meanwhile."

could not believe that the Court really meant to make this the law, therefore he undertook to interpret the case, discovering that the holding was that the Connecticut court really was deemed to be without jurisdiction to decide the case, because of the *fault* of the Connecticut plaintiff in deserting his wife. *Fault* was a jurisdictional fact; absence of misconduct in the suing plaintiff was essential to the court's power to act. Beale did not, however, devise this interpretation of the case in order to praise it.[16] Rather, he called attention to the fact that it would lead to almost inevitable conflicts of decision,[17] and he pointed out serious weaknesses which it would have in operation.

The Haddock decision was not without its defenders, however. For the most part, they restated the case in terms of their own notions of what should be the law, then approved the restatement rather than the words of the Court, but at any rate they were talking favorably about the Haddock case.

For example, it was urged[18] that, whether it has previously been true or not, the application of the due process clause (jurisdiction) and of the full faith and credit clause (extrastate recognition) to divorce decrees *ought* to be identical, and the narrower that application the better; that there *ought* always to be one state, and one state only, with power to grant divorce to a particular couple (i.e., a divorce valid therefore entitled to extrastate recognition). This meant of course that the marital *res* should be treated as an indivisible thing, never present at more than one place at any one time[19] so that, on the pure *in rem* theory, only the courts of that one place could affect its existence. It was recognized that the failure of the Haddock case to overrule the Atherton case prevented its actually going so far, but it was hoped that the Court could see its way soon to take the further step. This represented a logical and definite social point of view, a primary interest in divorce uniformity, with an incidental interest in lessening the number of divorces which might validly be granted. Argument was also made in favor of Beale's original interpretation of the case, under which "fault" was deemed a jurisdictional fact, but with the changed contention that this would be a desirable rule, making not only for uniformity in recognition of decrees but also for greater protection of the state's interest in the marital status.[20]

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[16]Beale, *op. cit.*, 19 HARV. L. REV. 586, 589: "The novel and extraordinary doctrine has never before been suggested by a civilized court or author. The Supreme Court of the United States is entitled to the credit of originality, at least."

[17]See *infra*, notes 39 to 43, and accompanying text.

[18]Schofield, *The Doctrine of Haddock v. Haddock* (1906) 1 ILL. L. REV. 219.

[19]Thus approximating the English view, under which the wife can seldom acquire a domicile separate from that of her husband. See Le Mesurier v. Le Mesurier (1895) A. C. 517. *Cf.* Stathatos v. Stathatos (1913) Prob. 46.

[20]By Robert James Peaslee, now Chief Justice of New Hampshire, in an article entitled *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457. Peaslee considered the

All this led more or less naturally to the position finally taken by the American Law Institute in its Restatement of the Law of Conflict of Laws.

Sec. 113. *State of Domicile of One Spouse.*

A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state

(i) has consented that the other spouse acquire a separate home; or

(ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or

(iii) is personally subject to the jurisdiction of the state which grants the divorce;

or

(b) the state is the last state in which the spouses were domiciled together as man and wife.

The full extent of Section 113 is made clear by comment "g" thereto, which reads as follows:

g. *Effect of Constitution of United States.* It follows from the rule stated in this Section and that stated in Section 43 that a divorce granted in a State of the United States in which one of the spouses is domiciled under circumstances other than those described in this Section, is invalid even in the State where the divorce is rendered. It also follows that such a divorce is not entitled to recognition in any other State under the full faith and credit clause of the Constitution of the United States.

Section 43 states that "Under the Constitution of the United States, the States cannot create interests if they have no jurisdiction." This rule is of course made under the authority of the due process clause of the Fourteenth Amendment, and it is pointed out that the Supreme Court of the United States may review all cases which involve a question of the exercise of power on the part of a State when it has no jurisdiction.

It is not difficult to say what the compilers of the Restatement were seeking to do.[21] Years had passed, and the Haddock case still stood, as did the Atherton case also. There was no indication that either of

concept of "fault" as a jurisdictional fact inconsistent with jurisdiction based on "last matrimonial domicile" where the defendant innocent spouse had departed therefrom, as in the Atherton case, and therefore concluded that that case should be overruled. He also contended that Maynard v. Hill, *supra,* note 7, was not really much involved in the problem, since it involved "legislative jurisdiction" rather than "judicial jurisdiction," and since the Oregon divorce occurred in 1852, which was before the due process clause became a part of the federal Constitution.

[21]The new rationalization of the law was set out in considerable detail in Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, in which Professor Beale, "twenty years after," announced a change in his views concerning the Haddock case.

them would be overruled; in fact, the United States Supreme Court had practically ceased to hear cases involving the validity of divorces.[22] The Reporter and his Advisers wished to restate the law in accordance with the federal Constitution as interpreted by the United States Supreme Court, but they also wished to state the law in a logical fashion, and one requirement of logic as they understood it was that if a divorce decree was valid, it was entitled to full faith and credit; if it was not entitled to full faith and credit, this was because it was not valid. In this logic lay their still persisting hope for uniformity of rule among the states. With this background, they sought to make the best they could of a bad situation. They collected all the situations in which the Haddock case had not expressly held that full faith and credit need not be given to a foreign divorce decree, and stated that in those situations full faith and credit would have to be given to such decrees, and then, to satisfy the logical requirement, they stated that there was no jurisdiction under the due process clause to grant divorce decrees except in those same situations.

The Restatement position was midway between that which considered the marital status an indivisible *res,* present always at one place and only one place, and that which considered the *res* divisible and present at the domicile of either spouse. The Restatement considered the *res* present at and subject to the jurisdiction of the domicile of either spouse, provided the other spouse could somehow be deemed to have assented to its presence there. This served to add an *in personam* aspect to the traditional *in rem* theory of actions for divorce, at least under Section 113 (a) iii, by which personal jurisdiction over the non-domiciled defendant can be added to the domicile of the plaintiff to give the court jurisdiction of the res.[23]

How have the cases followed the theories? It must be answered that while the theories were developing in the pages of the law reviews, the cases simply did not keep up with them. To begin with, the Haddock case of course did not say what the Restatement says. It did not say that full faith and credit had to be given to foreign decrees in all the situations enumerated in Section 113; it only said that full faith and credit need not be given in a certain set of facts not included, except by inference negatively, in Section 113. Further, it did not treat "fault" as a jurisdictional fact. Actually, it did not consider jurisdictional facts at all, beyond as-

[22]The last case in which the Court even dealt with the problem was Thompson v. Thompson, *supra,* note 14 decided in 1913.

[23]See Vreeland, *Mr. and Mrs. Haddock* (1934) 20 AMER. BAR ASSN. J. 568. This part of the rule is required by the case of Cheever v. Wilson, *supra,* note 5, in which a wife, after leaving the last matrimonial domicile in the District of Columbia, was held to have secured a valid divorce at her new domicile in Indiana. Though the court did not stress the fact, it was true that the husband appeared and defended in the Indiana action. *Cf. infra,* note 67.

suming without question that the original plaintiff husband's domicile in Connecticut gave that state power to grant a divorce valid within its own limits even though not absolutely entitled to recognition elsewhere. It is true that Holmes, J., said that he was unable to accept "the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those States." But that was in his dissenting opinion,[24] and the reason he made the statement was that the majority were accepting that very notion, and he objected to their doing so. The courts of the several states have for the most part been without even the objecting voice.

The state courts have generally followed very frankly what the Haddock case said. They assumed that under it they were not required to give faith and credit to certain foreign decrees, but that they were free to give such faith and credit as they chose. And most of them continued to give full faith and credit.[25] Even in the New Yorks courts, from whose unwillingness to recognize foreign decrees the whole difficulty arose, some such decrees were recognized under circumstances[26] which would fail to fall within the permissible limits of the Restatement's Section 113.

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[24]201 U. S. 562, at 632.

[25]Some of the decisions are Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920 (1914); Taylor v. Taylor, 64 Fla. 521, 60 So. 116 (1912); Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647 (1908); Holdorf v. Holdorf, 198 Iowa 158, 197 N. W. 910 (1924); Miller v. Miller, 200 Iowa 1193, 206 N. W. 262 (1925); Miller v. Miller, 89 Kans. 151, 130 Pac. 681 (1913), applying a Kansas statute [REV. STATS. OF KANS. (1923) § 60-1518] which requires that full faith and credit be given to all foreign divorce decrees rendered on service by publication in accordance with the law of the state granting the decree; Lepenser v. Griffin, 146 La. 584, 83 So. 839 (1919); Searles v. Searles, 140 Minn. 385, 168 N. W. 135 (1918); Howey v. Howey, 240 S. W. 450 (Mo. 1922); Keena v. Keena, 222 Mo. App. 825, 10 S. W. (2nd) 344 (1928); Ballentine v. Ballentine, 112 N. J. Eq. 222, 164 Atl. 5 (1933); Snyder v. Buckeye, etc., Co., 26 Ohio App. 166, 160 N. E. 37 (1927); Way v. Way, 132 S. C. 288, 128 S. E. 705 (1925); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106 (1910); Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779 (1917), rehearing denied, 139 Tenn. 700, 202 S. W. 723, L. R. A. 1918E, 587, 592 (1917); Humphreys v. Humphreys, 139 Va. 146, 123 S. E. 554 (1924); Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945 (1912); Caswell v. Caswell, 84 W. Va. 575, 100 S. E. 482 (1919). See also GOODRICH, CONFLICT OF LAWS (1927) 290; Walton, *International and Migratory Divorces* (1927) 21 ILL. L. REV. 435; McClintock, *Fault as an Element in Divorce Jurisdiction* (1928) 37 YALE L. J. 564, 571; Note (1935) 44 YALE L. J. 488; Annotations, 39 A. L. R. 603 (1925); 86 A. L. R. 1329 (1933).

[26]New York apparently holds that a divorce granted at a place which is neither the last matrimonial domicile nor the domicile of the wronged party will none the less be recognized as valid in New York if the state which was the wronged party's domicile at the time the divorce was secured by the other party by its law deems the divorce valid. Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921). Thus, if the wronged party were domiciled in one of the states whose decisions are set out in note 25, *supra*, the decree would be recognized, even though the same decree would not be recognized if the wronged party were domiciled in New York at the time of the divorce. *Cf.* Dean v. Dean, 241 N. Y. 240, 149 N. E. 844, 42 A. L. R. 1398 (1925). See Greene, *The Enforcement of a Foreign Divorce Decree in New York* (1926) 11 CORN. L. Q. 141, 160.

The experience of the Commission on Uniform State Laws throws interesting light on the public attitude toward the interstate divorce problem. In 1907 the Commissioners promulgated a Uniform Annulment of Marriage and Divorce Act,[27] which undertook to set out in detail the grounds for annulment of marriages, divorce from bed and board, and absolute divorce,[28] also the circumstances under which jurisdiction might be acquired to grant decrees giving such relief, and various other matters. This statute was adopted in only three states, Delaware, New Jersey, and Wisconsin. Its failure to gain general approval was probably due to the fact that relief from the marital status is a question upon which strong local public policy, or at least strong local public interest, varies much among the states, many taking the attitude that the severability of the marriage relationship, being a matter as to which numerous divergent views are held in modern society, is peculiarly the sort of problem that ought to be left open for experimentation in the more or less isolated social laboratories which the 48 states have been supposed to constitute. At any rate, the Commissioners in 1927 withdrew their recommendation of the 1907 Act, and in 1930 recommended a new act called the Uniform Divorce Jurisdiction Act, which in 1934 had been adopted by one state, Vermont. The Act is very brief, its essence appearing in two sections. The first section, on "Jurisdiction," lays down a rule very similar to that set out in Section 113, except that it speaks in terms of non-exercise of an existent jurisdiction save in the enumerated circumstances, rather than in terms of non-existence of jurisdiction. The second section really deals with the existence of jurisdiction when it states a rule for recognition of extrastate divorce decrees, as follows:

> Sec. 2. *Decree of Another State:* Full faith and credit shall be given in all the courts of this state to a decree of divorce by a court of competent jurisdiction in another state, territory or possession of the United States when the jurisdiction of such court was based upon provisions not inconsistent with the conditions prescribed in this act, even though such decree is not entitled to full faith and credit under the Constitution of the United States.[29]

Certainly it seems that the Commissioners of Uniform State Laws have gone on the same theory as have most of the state courts, that the Haddock

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[27]TERRY, UNIFORM STATE LAWS (1920) 300.

[28]Six grounds for absolute divorce were provided: Adultery, bigamy, conviction of crime, cruelty, desertion for two years, and habitual drunkenness.

[29]9 UNIF. LAWS ANNOT., SUPPLEMENT (1930) 121. A comment contained in the "Commissioners' Prefatory Note" to this act is also revealing. It states: "The present Uniform Divorce Jurisdiction Act is not in conflict with Haddock v. Haddock. It recognizes that law but goes further and holds that a state after substituted service of process may authorize decrees of divorce which will be good within the state; and by comity may recognize decrees of other states granted in like manner."

case does not state a rule of jurisdiction under the due process clause, but only a rule as to when full faith and credit need not be given to a foreign decree.

It must be remembered also that some states claim jurisdiction to grant divorce decrees under circumstances which do not satisfy any accepted theory of jurisdiction known to the American Constitution or to the common law.[30] Decisions in such states contribute nothing to the law as it stands, except a sense of social dissatisfaction which appellate judges find it usually convenient to ignore. Perhaps the decisions of some of the states which recognize foreign divorces granted under circumstances in which the Restatement would say there is a lack of jurisdiction to act may be attributed to this same sense of social dissatisfaction with the law as it is. Perhaps such cases should therefore not be considered in a study which merely undertakes to discover what the law is, nor be used as a basis for criticism of a Restatement of the underlying theory of the present law. On the other hand it could also be pointed out that there is some usefulness to discussion of what the law ought to be, and that sometimes social dissatisfactions are more the stuff that makes the law than are lists of earlier decisions. The extent to which a rule satisfies current social ideals and policies and gives protection to the legitimate interests of private persons whose lives and property are affected may have a great deal to do with whether it is to be the law.

It has been customary to divide legally protectible interests in two groups—the private interests of parties to the suit, and public or social interests. What interests of these sorts are there, that might be affected by the adoption of one rule or another concerning jurisdiction to grant divorces?

The parties whose private interests the law might seek to protect by means of such a rule would obviously include not only the two spouses, plaintiff and defendant, but also any children of the marriage whose sustenance and life might be directly affected by the granting of a divorce to their parents. The interests of the spouses obviously involve property, mode of life, and freedom of personality, and probably the whole multitude of detailed private interests which exist around the marital relation-

[30]See Squires v. Squires, 186 Ark. 511, 54 S. W. (2d) 281 (1932). Though such divorce decrees may be accepted socially, and therefore have real value to those who secure them, they will be treated as wholly void in other states. Andrews v. Andrews, 188 U. S. 14 (1903); State v. Cooke, 110 Conn. 348, 148 Atl. 385 (1930); Hood v. State, 56 Ind. 263 (1877); Walker v. Walker, 125 Md. 649, 94 Atl. 346 (1915); State v. Armington, 25 Minn. 29 (1878); Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1915); Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930). Such invalid divorces may give rise to certain legal rights by way of estoppel. See Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158; Leflar, *Extra-State Recognition of Divorce Decrees* (1931) 2 UNIV. OF ARK. LAW SCHOOL BULL. 61.

ship may be fairly summarized thus. The interests of the children in their parents' marital status are at bottom rather similar to the interests of the spouses themselves. It seems that jurisdiction to grant divorces affects these interests principally at two points: first, in that it determines the extent to which the existence or non-existence of marital relationships (including all their incidents and effects) will achieve uniform recognition in all states; second, in that it determines whether pending efforts to deprive persons of their interests will be brought to the *notice* of such persons, and they be given fair *opportunity to defend* against improper deprivations.

The unsatisfactory nature of a rule of jurisdiction which fails to secure uniform recognition for the decrees rendered under it is self-evident. The idea of both spouses being unmarried and free to remarry in one state while in a neighbor state they are deemed still married, their remarriages bigamous and the issue of such remarriages bastard[31] is only slightly less revolting than the idea that one spouse has completely freed himself from the marital relationship everywhere, while the other spouse remains everywhere married, presumably to the unmarried spouse.[32] If any rule can in practice secure uniformity among the states in determining what divorces are valid, that fact alone will recommend it strongly.

Even greater evils lie, however, in the possibility that divorces awarded in *ex parte* proceedings may be granted without actual notice, or without any fair opportunity to defend, given to the defendant spouse. Under the fiction that there is a *res* present like a physical entity at the place where the technical conceptual thing called domicile is discovered, and that a person may be depended upon to keep in touch with any *res* in which he has an interest so that actions brought concerning it will more or less automatically come to his attention even though constructive service of

[31]This idea being accepted in the Haddock case, 201 U. S. 562, at 577, and in a good many other cases. It was frankly approved in Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1915): "There is nothing strange in the notion that a man may be a married man in one state and an unmarried man in another state. A woman in New Jersey may be recognized by all the governmental agents of that state as married to a man in Illinois, while the man in Illinois may be recognized by all the governmental agents of that state as not married to the woman in New Jersey, but as unmarried, or married to some other woman. Each state enforces its own view within its own territory . . ." For a vigorous criticism of the idea, see Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841 (1896).

[32]See People v. Baker, 76 N. Y. 78 (1879): "Now if the matrimonial relation of the one party is the *res* in one state, is not the matrimonial relation of the other party a *res* in another state? . . . And hence if one party to a proceeding is domiciled in a state, the status of that party as affected by the matrimonial relation may be adjudged . . . in accordance with the laws of that state. But has not the state in which the other party . . . is domiciled, also the equal right to determine his status . . . It will prove awkward . . . for a man to be a husband . . . in one jurisdiction, and single and marriageable in another. Yet it is only in degree that it is harder than other conflicts in laws." See also Weir v. Weir, 226 N. Y. S. 115 (1927).

process falls short of actual notice, many spouses find themselves divorced without having even known of the divorce proceedings. This situation is of course unfairly detrimental not only to the defendant spouse but also to children of the marriage who sometimes have to depend almost wholly on the defendant spouse to represent their interests. Furthermore, the unfairness is by no means limited to cases in which the *ex parte* proceeding is brought in a state which is a new domicile of the suing spouse only; it may occur in a case in which the action is brought in the state which was the last matrimonial domicile, or in any case whatever in which *in rem* procedure is followed and only contructive service employed. It is apparent that the bringing of the suit at the place which fulfills the domicile concept does not necessarily in and of itself give any assurance whatever of notice or fair opportunity to defend; if the *in rem* theory of the nature of divorce actions is still to be followed, such assurances must come from separate rules governing the type of constructive service required.[33]

When the cases speak of the protection of "interests" as affected by the rule governing jurisdiction, they generally refer to the "interests of the state." What "interests of the state" are there to be considered?

First, a state has a very real interest in the general welfare of its citizens. That of course includes both plaintiffs and defendants in divorce suits, and their children. And as to such persons, it includes the very matters which have been mentioned as private interests of parties in the last few paragraphs. Insofar as the phrase "interests of the state" means the same thing as "public and social interests," it is largely synonymous with the totality of the various private interests balanced together. Most of the reasons which go to make any particular human conduct or legal ruling affecting human conduct socially desirable or undesirable are bound up in the interests and welfare of the individuals directly or indirectly affected by it. The fact which causes consideration of social interests frequently to lead to conclusions different from those arrived at on the basis of consideration of private interests only is that a greater variety of private interests of more persons are being considered. Once it can be

[33] "It may well be that due process of law requires some better notice than mere publication of summons. If we accept the proposition that it is also a principle of the conflict of laws that judicial jurisdiction over a status cannot be exercised unless a method of notification is employed which is reasonably calculated to give interested persons knowledge of the proceeding and an opportunity to be heard, it would seem to follow that publication would be insufficient. Where the *res* within the jurisdiction is tangible, there is reason to hold that the owner must take notice of proceedings where that *res* is situated, but where it is a status which may be affected by decree in any jurisdiction where the other party to the relationship may acquire a domicile, we may well require notice to be given. There would probably be no disagreement from the proposition that publication of summons, as ordinarily made, results in no notice to anyone." McClintock, *Fault as an Element in Divorce Jurisdiction* (1928) 37 YALE L. J. 564, 577. And see McDonald v. Mabee, 243 U. S. 90 (1917).

determined that all relevant private interests have been brought out for consideration, it may fairly be assumed that most of the matters having bearing on the public interest are also available for consideration. In other words, adequate protection of private interests will give adequate protection to these social interests also, the only difference being that we recognize more clearly the importance of affording the protection.

Sometimes, however, when the state's interest in the marital relationship is spoken of, the idea is that of the state as a juristic person having interests not only apart from the individual interests of its citizens, but even apart from the balanced totality of relevant interests of all individuals. Of necessity such interests must exist, if at all, in some particular state or states, and not merely in states generally. If such interests exist, what are they?

They are usually expressed in terms of protection of the public morals. This might mean that the State is interested in compelling "morality" in particular spouses contesting in a particular case, or in all spouses generally. At any rate, whatever it means, it is certain that there is no accepted standard among the states as to what constitutes "morality," and that it must be left to each state to decide for itself what moral concepts it is interested in, and how they may be fostered. Further, this attitude implies that the moral standards of some states are so much lower than those of others that the latter states need to protect themselves against the former by a rule of jurisdiction. It is assumed that the state whose interests are affected by transactions concerning any particular marital relationship is the one in which the *res* has its situs, i.e., where the parties are domiciled, and that it is this state which will set the moral standard which the rule as to jurisdiction will give it the opportunity to enforce. The practical enforceability of this state interest in public morality by means of a rule of jurisdiction may be questioned, and the actual existence of the interest except in an abstract form may be doubted,[34] but it has repeatedly been asserted to be an important if not controlling element in the problem,[35] and must therefore be taken into account.

Section 113 of the Restatement declares that jurisdiction to grant divorces exists in some cases in which the United States Supreme Court has not said that full faith and credit must be given,[36] and at the same time it sets up a jurisdictional fact, submission of the absent spouse's interest in the *res* by his consent or fault permitting its removal to the state in

[34]The well-known ease with which collusive divorces may almost everywhere be secured, and the current public attitude which, even in New York, seems to favor the divorce of unhappily married couples, indicates that the content of the state's interest may be in process of change.

[35]GOODRICH, CONFLICT OF LAWS (1927) 284; Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, 424; Comment (1935) 44 YALE L. J. 488, 496.

[36]This is true of the rules set out in Sec. 113 (a) (i) and 113 (a) (ii).

which it is found, which most states do not at present consider a jurisdictional fact.

The principal problem to be considered is whether the concept of fault, or misconduct, as a jurisdictional fact materially serves any of the substantial private or social interests that have been suggested. It has been urged vigorously that it would aid in establishing uniformity of rule as to the recognition and original validity of decrees.[37] Obviously this will be true if the rule is enforced as a part of the due process clause and all courts are compelled to deny jurisdiction to hear *ex parte* divorce cases unless it is conclusively proved that the absent defendant (who has not caused one of the other jurisdictional tests to be satisfied) is guilty of fault or misconduct measured by some well-defined standard. The theory behind the adoption of Section 113 by the American Law Institute was that this would happen.[38] Whether it will happen in fact must to a large extent determine the desirability of acceptance of the proposed rule of jurisdiction. Such uniformity to be worth-while must exist in practice and not merely in legal theory.

Assume that an *ex parte* divorce action is brought by H against W, in the courts of State M, the defendant not appearing. The plaintiff presents witnesses who testify according to his view of the facts; no testimony is given on behalf of the defendant. Will the court discover the necessary jurisdictional fact of misconduct in the defendant? Every probability indicates that it will, and there will be no error in its doing so. The important characteristic of a court's finding of its own jurisdiction, however, is that it is subject to collateral attack.[39] That means that the validity of the divorce is not *res judicata,* that in any subsequent action anywhere involving this marital status the later court not only may but must permit a reinvestigation of the jurisdictional fact, fault in the original defendant, which was probably also the substantive ground for divorce alleged in the first suit. What are the probable circumstances under which such later actions may be brought? Sometimes they will be actions for divorce, or for judicial separation, brought by the other spouse.[40] Sometimes they will be prosecutions of one of the spouses on account of new relationships entered into in reliance on the validity of the original di-

[37]See Beale, *supra,* note 35; Peaslee, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457; Schofield, *The Doctrine of Haddock v. Haddock* (1906) 1 ILL. L. REV. 219; Vreeland, *Mr. and Mrs. Haddock* (1934) 20 AMER. BAR ASSN. J. 568.

[38]Beale, in 39 HARV. L. REV. 417, at 427, confidently urges that the rule be adopted as a means of achieving uniformity in recognition of the validity or nonvalidity of divorces. He says at p. 430: "If now all states can agree in going no further than these requirements, the odious results of differences of opinion as to jurisdiction for divorce will be eliminated."

[39]Thompson v. Whitman, 18 Wall. (U. S.) 457 (1873).

[40]As in both Atherton v. Atherton, *supra,* note 10; and Haddock v. Haddock, *supra,* note 11.

vorce.[41] Sometimes they will be efforts to annul subsequent marital alliances on the ground that a party to the first suit still has a prior living spouse.[42] Sometimes they will be actions on behalf of the other spouse, or of children by that spouse, to claim interests in the original plaintiff's property after his death.[43] Always they will be actions tried some time later, or a long time later, usually at a different place, and usually on the testimony of a wholly different group of witnesses. Often in the later action the spouse who was plaintiff in the first suit will be substantially unrepresented so that it will be practically an *ex parte* proceeding just as much as was the first suit. At least the new action is apt to be dominated by motives and based on evidence exactly opposite to those which prevailed in the prior suit. This means that in the second action it is very likely that fault in the original defendant will not be found, and the absence of the jurisdictional fact will cause the original decree to be deemed a nullity. This means that one court has found the jurisdictional facts one way, and another court the other way. Desirable uniformity certainly has not yet been achieved. Treating the question of fault as *res judicata* by reason of the first decree would have come much closer to achieving it.

It is pointed out that a complete answer to this lies in an appeal to the United States Supreme Court on the full faith and credit clause, which deemed a nullity. This means that one court has found the jurisdictional question.[44] By the same token, due process of law being involved, there was likewise a ground for taking the first case directly to the United States Supreme Court. But will the mass of cases involving the validity of divorces ever reach that court? Or should they? Larger questions today make up its principal concern, and there is no indication whatever that it will undertake to perform the burden which it is proposed to place upon it. Under its present rules, the court has a wide latitude in determining what cases it will hear, and the fact that it has heard no divorce cases at all since 1913[45] shows that the hope of gaining uniformity by this procedural route is a very dim one indeed.

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[41]As in State v. Armington, *supra,* note 30; People v. Baker, *supra,* note 32.

[42]As in Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591 (1932); Ball v. Cross, *supra,* note 27. Also see Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930).

[43]As in Andrews v. Andrews, *supra,* note 30; Maynard v. Hill, *supra,* note 7.

[44]To the argument that uniformity will still not be achieved because of the variety of evidence, etc., before the two successive courts, Beale says (39 HARV. L. REV. 417, at 428) ". . . there will always be an appeal to the Supreme Court of the United States if the second court finds the jurisdictional facts differently from the first; and the question can therefore be definitely settled." In reply to the argument that it is undersirable to add to the number of jurisdictional facts subjecting a judgment to collateral attack, Beale says (39 HARV. L. REV. 417, at 429) ". . . an acceptance of the rule in the Haddock case would only slightly increase the number of jurisdictional facts."

[45]Thompson v. Thompson, *supra,* note 14.

Furthermore, if fault is to be a jurisdictional fact, it must be made clear what constitutes fault. The definition of fault must not only be clear in each state separately, but the definition must be the same in all states. Is there any such uniform definition? The Restatement's only contribution to such a definition is suggested by the words: "If the misconduct of one spouse is such that the other leaves him without being guilty of desertion . . ."[46] Is the idea of what constitutes desertion the same in all the states? Undoubtedly it is not. Some states may not even have the concept of desertion in their law; among other states the legal grounds for divorce vary widely, and very often the question of whether one spouse is justified in leaving the other depends upon whether the other has given the one valid grounds for divorce. A divergence of view among the various states as to what factual elements are necessary to constitute this requisite to jurisdiction would be fatal to any hope for uniformity; the possibility of the state of the first action determining the jurisdictional fact by one test while the state of collateral attack determines the jurisdictional fact by another test would be unthinkable. Here again the United States Supreme Court offers the only hope, it being the last resort for the ascertainment of jurisdictional facts in particular cases as well as for the authoritative determination of tests for jurisdiction and all its factual elements. Is there any indication that this Court will undertake to decide enough divorce cases to make clear just what physical facts suffice to constitute desertion? Again it can only be said that the Supreme Court has not evinced the slightest interest in this problem, and there is no special reason why it should.

If the only court in the land which can expound the Constitution authoritatively does not enforce and give meaning to this rule which is spoken of as a rule of Constitutional Law, the courts of the states are the only ones left to do so, and they must be voluntarily unanimous in their acceptance and interpretation of it if it is to achieve the purposes claimed for it. That they were not unanimous in, or even much inclined toward, such acceptance between 1906 and the appearance of the Restatement rule in tentative form in 1926[47] may fairly be attributed to the fact that most courts had not even a faint idea that the rule existed.[48] But the rule was at least formulated in 1926, and in the years since then the courts have had some opportunity to indicate whether they considered themselves bound by it as a part of the federal Constitution. Acceptance

[46]RESTATEMENT, CONFLICT OF LAWS, § 113, Comment c.

[47]CONFLICT OF LAWS, TENTATIVE RESTATEMENT No. 2 (1926) § 116. Of this, Beale says, "It usually takes the bar at least twenty years to appreciate the real reasons for a novel decision . . ." 39 HARV. L. REV. 417, 426.

[48]Doubtless their ignorance of the rule was fostered by the fact that the United States Supreme Court had in the Haddock case expressly stated that there was no such rule of jurisdiction. See *supra*, note 24, and accompanying text.

of the rule certainly falls far short of voluntary unanimity[49] even though the authority of the Restatement has induced some courts to accept it,[50] and will doubtless induce more to do so in the future. The fact remains that a clear majority of our courts are already committed to another view, under which they voluntarily recognize divorces granted at the domicile of one party, without inquiring into the fault of the other party as a jurisdictional fact, and they will not be inclined to begin refusing to recognize such divorces unless the highest court of the land tells them that they must. It may as well be frankly admitted, then, that until the Supreme Court does just that, expectation of achieving uniformity as to the validity and extrastate recognition of divorces by means of the Restatement rule is a useless piece of wish-thinking.

What of the other point at which the rule as to jurisdiction may affect private interests, i.e., the possibility that divorces granted purely on the *in rem* theory will be given without notice or fair opportunity to defend?[51] Professor Beale in his explanation of the Restatement view undertakes to show that it will protect this interest, in that no state will have jurisdiction to grant a divorce unless the absent spouse has by his consent to separate domicile, or his misconduct, or by appearance, submitted his interest in the *res* to the state of new domicile of the suing spouse.[52] He supports this by analogy to his theory that no state has jurisdiction, in the due process sense, to affect interests in the title of a chattel unless the owner of such interests has somehow voluntarily submitted them to the control of the state which seeks to exercise jurisdiction over them.[53] Assuming the soundness of this theory[54] and the correctness of the analogy, it may still be pointed out that the additional protection afforded

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[49]See *supra,* note 25.

[50]For example, Delanoy v. Delanoy, 216 Cal. 27, 13 Pac. (2d) 719, 86 A. L. R. 1321 (1932), expressly accepts the rule laid down by Sec. 113, treating the absence of fault in the non-resident defendant in a Pennsylvania divorce action as the absence of a jurisdictional fact subjecting the Pennsylvania decree to collateral attack. Some other states simply follow the Haddock case in its holding that certain foreign decrees need not be given full faith and credit, without treating "fault" as a jurisdictional fact at all. See Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028 (1916); Pridgen v. Pridgen, *supra,* note 42; Montmorency v. Montmorency, 139 S. W. 1168 (Tex. Civ. App., 1911).

[51]See *supra,* note 33, and preceding text.

[52]Beale, *supra,* note 35, 39 HARV. L. REV. 417, at 424. He says "By an historical accident the interest of the state has been considered almost exclusively . . . It seems that in order to adjudicate the title to a thing a court should have jurisdiction not only over the thing, but also over the owner, so far as his interest in the thing is concerned. This jurisdiction is usually found in his submission of the thing to the court by placing it or intentionally leaving it within the state."

[53]The theory is explained in Beale, *Jurisdiction over Title of Absent Owner in a Chattel* (1927) 40 HARV. L. REV. 805, and stated in CONFLICT OF LAWS, TENTATIVE RESTATEMENT No. 2 (1926) § 52.

[54]The principal support for this theory is drawn from Edgerly v. Bush, 81 N. Y. 199 (1880). And see Taylor v. Boardman, 25 Vt. 581 (1853). Other cases reaching consistent results, but based on other theories than the jurisdictional

by it to the absent spouse and the children whose interests he may represent is theoretical only, and amounts to nothing whatever in practice. A spouse who has consented to a separation or who has by his fault justified a separation nevertheless has substantial interests in the marital status, and the need is to see that he is not deprived of those interests by an action in which he has no opportunity to defend. To say that his interest is present with the *res* at the domicile of the other party gives him small comfort; the lack of a chance to do something about it is the only thing that has any significance or involves any substantial unfairness to anybody. Unless the proposed rule to some extent supplies that lack, argument for its adoption on this ground is scarcely permissible.

The "interests of the state" are next to be considered. First, insofar as they coincide with the interests of private persons, or even the totality of such interests, there is not much to add to what has been said concerning them as purely private interests in the last few paragraphs. If the Restatement rule gives them no additional protection singly, it can hardly be urged that it aids the balanced sum of them. And the interests of the state as a juristic person, in the protection of public morals,[55] seems to need no further aid than it receives from the full faith and credit aspect of the Haddock case. Such an interest in a particular state, distinguishable from the interests of other presumably less moral states, has existence only to the extent that the particular state discovers it for itself. Any state which does so discover it can under the actual reasoning of the Haddock case protect its discovered interest by refusing to recognize certain divorces granted elsewhere. There seems no reason for requiring other states which do not feel that they have such interests to discover and protect them.

Does the practice which is currently accepted and applied by most of the states[56] whereby faith and credit is given, even though it need not be, to all divorces granted at the domicile of one spouse, produce results materially less desirable socially than would the proposed rule? First, what of uniformity? Certainly, the best basis for uniformity of recognition of divorce decrees is in application of the doctrine of *res judicata*

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one, include Union Securities Co. v. Adams, 33 Wyo. 45, 236 Pac. 513, 50 A. L. R. 23 (1925); Forgan v. Bainbridge, 34 Ariz. 408, 274, Pac. 155 (1928). State decisions reaching inconsistent results are also available. Hart v. Thompson, 37 N. M. 267, 21 Pac. (2d) 96, 87 A. L. R. 962 (1933); Willys-Overland Co. v. Chapman, 206 S. W. 978 (Tex. Civ. App., 1918); Chambers v. Consolidated Garage Co., 210 S. W. 565 (Tex. Civ. App., 1919). It is interesting to note also that the final edition of the Restatement does not include the original Section 52 as a jurisdictional rule. [RESTATEMENT, CONFLICT OF LAWS (1934) § 49], thus dropping the analogy from which Section 113 drew its principal theoretical support. See Lorenzen and Heilman, *The Restatement of Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555, 567.

[55] *Supra,* notes 34, 35, and preceding text.

[56] *Supra,* notes 25, 26, 30, and 50.

to all findings of fact in suits for divorce. If *res judicata* were so applied, everybody could know surely whether a particular divorce were valid or not. The Haddock case removes the possibility of this approach as a compulsory one, but most courts still make use of it as a practical means for achieving as much uniformity as they can. In view of the facts that at least some measure of uniformity is being now achieved, that the operation of Section 113 would in practice tend to produce actual uncertainty rather than uniformity by reason of its multiplication of jurisdictional facts[57] and the inexactness of the test to be applied to those facts,[58] and that the new rule holds not even a hope of uniformity except on the condition of a universal adoption of the rule (which there is no reason to expect),[59] it seems that on this point at least the present practice is to be preferred to the proposed theory. Next, what of personal justice to interested parties—fair opportunity to defend? It is true that the *in rem* theory of the proceeding under the current practice frequently works injustice, but it has been pointed out that no improvement save in abstract theory could be expected from the proposed rule.[60] The change would be harmless, but more than negative harmlessness is needed to justify a far-reaching change. Then what of the interests of states as jural persons, insofar as they have such interests? The present practice permits states to give as complete protection to these interests as anyone would argue that they should be allowed to give;[61] in fact, the principal objection made to the present practice is that under the Haddock case individual states are allowed to enforce these local interests too completely.[62] Yet under Section 113 the objectionably unnecessary enforcement of these vague interests of the state of domicile would be no longer left to the option of the several states, but would become a matter of jurisdictional compulsion even in states which disclaimed the existence of any such interests which they were desirous of protecting.

Even a current practice which it is deemed for practical reasons advisable to retain deserves, however, some justification in terms of acceptable legal theory. It has been urged that any judgment of a court having jurisdiction is entitled to full faith and credit, and that if it is not entitled to full faith and credit it is because the court rendering the judgment was without jurisdiction. Can the denial of this idea by the majority of the court in the Haddock case be explained without doing violence to the fundamental principles of the Constitution? It is submitted that it can be, and simply.

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[57] *Supra,* notes 39 to 45, and accompanying text.
[58] *Supra,* note 46, and accompanying text.
[59] *Supra,* notes 47 to 50, and accompanying text.
[60] *Supra,* notes 51 to 54, and accompanying text.
[61] See the text accompanying notes 34, 35 and 55, *supra.*
[62] *Supra,* note 15, and following text.

There are other types of judgments and decrees known to our law as perfectly valid, yet which are not within the protection of the full faith and credit clause of the Constitution. The best known example of these is the equity decree ordering the conveyance of land in another state as part of a property settlement accompanying a divorce. No doubt has ever been expressed as to the power of equity courts to issue such decrees. They are *in personam* in nature, directed against parties personally before the court, requiring an act (the execution of a deed of conveyance) which can be performed in the state whose courts issue the decree, they are constantly granted by courts of equity in appropriate cases, and their validity and binding effect are frequently recognized and effectuated even in other states.[63] Yet it seems well settled that the full faith and credit clause does not absolutely entitle such decrees to recognition in other states.[64] The content of the jurisdictional rule in the due process clause is not deemed synonymous with the recognition compelled by the full faith and credit clause.[65]

Perhaps this is not a result perfectly desirable, but it does seem perfectly understandable. Our constitutional law recognizes an area of what might be called "non-conclusive jurisdiction," an area in which, for better or for worse, comity rather than compelled recognition is the rule. It may well be argued that a rule of compelled extrastate recognition of valid judgments and decrees would be preferable, but when the Supreme Court of the United States sees fit not to impose such a rule, the rule simply does not exist. To insist that it does exist, by declaring that a currently exercised jurisdiction is improperly exercised, thereby narrowing the jurisdictional rule to fit the limits of the full faith and credit rule, is a Procrustean operation which the Court never meant to perform in the past and gives no indication of intending to perform in the future.[66]

All that has been said leads to the conclusion that the *in rem* theory of divorce jurisdiction often works unfairly, principally by reason of de-

[63]Matson v. Matson, 186 Iowa 607, 173 N. W. 127 (1919); Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182 (1916). See Barbour, *The Extra-Territorial Effects of the Equitable Decree* (1919) 17 MICH. L. REV. 527; Goodrich, *Enforcement of a Foreign Equitable Decree* (1920) 5 IOWA L. BULL. 230; Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State* (1930) 14 MINN. L. REV. 494, 506.

[64]Fall v. Eastin, 215 U. S. 1 (1909); Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A 213 (1894). For varying explanatory discussions of this situation, see also Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382; Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 228; Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land* (1925) 34 YALE L. J. 591; Pound, *Progress of the Law—Equity* (1920) 33 HARV. L. REV. 420, 423.

[65]This fact is criticized, for example, in Schofield, *Full Faith and Credit v. Comity and Local Rules of Jurisdiction* (1915) 10 ILL. L. REV. 11, but it remains a fact nevertheless.

[66]See Lorenzen and Heilman, *supra,* note 54, 83 U. OF PA. L. REV. 555, at 564.

priving absent defendants of opportunity to present evidence and make adequate defense to suits. It is seen that the adoption of the Restatement rule of Section 113 would not remedy this one outstanding defect in the present theory. Insofar as there is any remedy for it, it seems to lie in a leaning toward an *in personam* theory for the nature of the action[67] as a means of insuring that actual notice of suits will be given to non-resident defendants, at least to the extent of insistence upon types of contructive service in *in rem* actions that will have a more genuinely substantial tendency to give actual notice of pending suits. The due process clause might conceivably be interpreted as requiring some higher type of constructive service than is now usual,[68] but even if it is not, the states may voluntarily choose to provide for something close to an assurance of actual notice. If that be done, it seems that our law will have gone as far as it is desirable for it to go in changing the rules as to jurisdiction to grant divorces, short of an outright scrapping of the *in rem* theory itself.

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[67]At least one famous American case, Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923), apparently proceeded on an *in personam* theory altogether. A husband and wife, both domiciled in New York though resident in France, were parties to a divorce action in France, both appearing, and the divorce there granted was later held valid in New York. See also Kinnier v. Kinnier, 45 N. Y. 535 (1871); Vreeland, *supra,* note 37. In some European countries, divorce actions are purely *in personam.* Beale, 19 HARV. L. REV. 586, 589; Comment (1935) 44 YALE L. J. 488, 497. Some well-settled and generally accepted principles of the common law seem inconsistent with the *in rem* theory as a rule of jurisdiction. For example, a divorce rendered at a place not the domicile of either party will by estoppel be binding on the plaintiff who procured it, and even on a defendant who appeared or otherwise overtly indicated a willingness to have the court act in the case, or on either party who afterward remarries. Bledsoe v. Seaman, 77 Kans. 679, 95 Pac. 576 (1908); Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359 (1916); Bruguiere v. Bruguiere, 172 Calif. 199, 155 Pac. 988 (1916). And see Butts v. Butts, 152 Ark. 399, 238 S. W. 600 (1922); articles by Harper, and Leflar, cited *supra,* note 30. If this be a case of total absence of jurisdiction in the court rendering the decree, and absence of jurisdiction is something which cannot be waived, as it is commonly said to be, the inconsistency becomes apparent. Even in the CONFLICT OF LAWS RESTATEMENT [Sec. 113 (a) iii], a combination of *in rem* and *in personam* theories appears, when it is stated that jurisdiction otherwise deemed non-existent is created by personal subjection of the non-domiciliary spouse to the court of the other spouse's domicile.

[68]*Supra,* note 33.

THE DOCTRINE OF ELECTION AS APPLIED TO UNDISCLOSED PRINCIPAL AND AGENT

KARL STECHER*

The purpose of the present article is to examine the doctrine of election as applied to undisclosed principal and agent. It is the soundness of the doctrine itself that will be discussed. Therefore no attempt will be made to present a panorama of the cases involving this question or to match shades of color to see why the court in one case said tweedledum and in another case tweedledee. This will explain also the reason for taking broad statements of principle in some instances from texts rather than from court decisions.

The general principle involved is broadly stated by Mr. Mechem as follows:

> "It is the general rule that the real principal in the transaction, though undisclosed at the time of making the contract, may at the election of the other party if exercised within a reasonable time, be held liable, when discovered, upon all simple contracts made in his behalf by his agent, even though at the time of making the contract the party dealing with the agent did not know that he was an agent or did not know who his principal was, and gave credit to the agent supposing him to be the principal."[1]

At the outset it may be stated that this means an actual agency must exist and the principal can be held only to the extent of the actual authority conferred.

While the general principle above-stated may have occasioned question as to its soundness in a by-gone day, it may now be taken as firmly imbedded in the law.[2] It is not the general statement that causes difficulty, but the application of that statement and its exceptions to actual situations.

One of these exceptions, as stated by Mr. Mechem, is the following:

> "The principal can not be held where, before the other party presents his claim, the principal has in good faith settled with, credited or paid the agent* relying upon some conduct of the other party from which it was reasonable to infer that the agent has al-

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[1]MECHEM, OUTLINES OF AGENCY (3d ed.), § 465. 2 MECHEM ON AGENCY (2d ed.), §§ 1731, 1751-1753, 1756; 2 C. J. 840, 843; 21 R. C. L. 890, 895.

[2]MECHEM, OUTLINES OF AGENCY (3d ed.), §§ 464, 465. 2 MECHEM ON AGENCY (2d ed.), § 1751; 2 C. J. 840, 843; 21 R. C. L. 890, 895.

ready settled with such third party, or that the latter looks exclusively to the agent for payment."[3]

It is stated that the American decisions support the rule only so far as the asterisk above, whereas the statement in its entirety represents the English rule.[4]

The origin of this rule in the English courts, the dicta to the contrary in subsequent decisions, and the subsequent repudiation of the dicta and the return to the original rule in England are all very clearly set forth in an excellent article by Mr. John W. Beaumont.[5] The highlights in the history of the rule are the following:

In 1807 Lord Ellenborough stated, in the case of *Kymer v. Suwercropp*:[6]

> "A person selling goods, is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely upon the broker."[7]

Then in 1829 came the following dictum of Lord Tenterden in the case of *Thomson v. Davenport*:[8]

> "I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with the principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal."

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[3] MECHEM, OUTLINES OF AGENCY (3d ed.), § 469. 2 MECHEM ON AGENCY (2d ed.), §§ 1738-1749; 2 C. J. 846.

[4] MECHEM, OUTLINES OF AGENCY (2d ed.), § 469. See also note (3).

[5] Beaumont, *The Liability of an Undisclosed Principal for Goods Purchased by his Agent* (1889) 23 AMERICAN LAW REVIEW 565. See also Clayton, *Election Between the Liability of an Agent and his Undisclosed Principal* (1925) 3 TEXAS LAW REVIEW 384; McCarthy, *Election of Third Party's Rights Against Undisclosed Principal* (1930) 7 NEW YORK UNIV. LAW REVIEW 957; and comments in 24 MICHIGAN LAW REVIEW 298; 22 ILLINOIS LAW REVIEW 181; 39 YALE LAW JOURNAL 265; 18 CALIFORNIA LAW REVIEW 569.

[6] (1807) 1 Camp. 109, 170 English Reprint 894.

[7] Note (6) at page 112, or Reprint at page 895.

[8] (1829) 9 B. & C. 78, 109 English Reprint 30.

This was purely dictum, for the principal was there held liable. It was copied by American text writers and found its way into the expressions of the American courts, however, on the unfounded assumption that it represented "the law."[9]

In 1855 Parke, B., followed the view of Lord Ellenborough in *Kymer v. Suwercropp*[10] in the case of *Heald v. Kenworthy.*[11] He stated:

> "The plea simply states, that after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of the opinion that this is no defense to this action. It is clear that if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly. But there are no doubt cases and dicta, which unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant."[12]

He then quotes the above-mentioned dictum from *Thomson v. Davenport*[13] and continues:

> "The expression 'make it unjust,' is very vague, but if rightly understood, what the learned judge said, is, no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and the seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant, or to induce him to alter his position."[14]

In 1880 the question came squarely before the Court of Appeal in the case of *Irvine & Co. v. Watson & Sons.*[15] All three judges unequivocally expressed approval of the statement of Parke, B., in *Heald v. Kenworthy*[16] as correctly stating the law. Bramwell, L. J., stated:

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[9]See *supra,* note (5), Clayton.
[10]*Supra* note (6).
[11](1855) 10 Exch. 739.
[12]*Supra,* note (11).
[13]*Supra,* note (8).
[14]*Supra,* note (11)
[15](1880) 5 Q. B. D. 414.
[16]*Supra,* note (11).

"It is true that in *Thomson v. Davenport*[17] both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the dicta of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or not, the opinion of Parke, B., in *Heald v. Kenworthy*[18] seems to me preferable; it is this [quoting[19]]. That is in my judgment a much more accurate statement of the law."[20]

The weight to be accorded to such dicta has been accurately appraised by Brett, L. J., in *Irvine & Co. v. Watson & Sons*[21] where he stated:

"Now, I think it is not fair to put a strictly literal interpretation on the language used by judges when merely glancing at by matters, with their minds mainly directed to another question, and, tying them down to the very words they used, to assume that those words contained in their opinion an absolutely accurate statement of the law. I do not think those dicta were so intended to be read. In *Heald v. Kenworthy,*[22] however, the question directly arose. And Parke, B., after citing the dictum of Bayley, J., to the effect that the seller cannot sue the principal if the state of accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent."

And thus the sacred rule of non-liability in case of prior settlement between principal and agent, which the American courts seem inclined to follow, is found to be merely a mirage, misleading the unwary.

It is difficult to see why a principal who has succeeded in secretly binding a third party to him unawares to that party should be accorded greater consideration than a principal who has dealt openly with that third party. Yet such is the purport of the dictum sought to be engrafted upon the law. Immediately upon entering into a contract a disclosed principal is bound to the third party. No dealing between the

[17] *Supra,* note (8).
[18] *Supra,* note (11).
[19] Quoting substance quoted above, note (14).
[20] *Supra,* note (15), at page 417.
[21] *Supra,* note (15), at page 420.
[22] *Supra,* note (11).

principal and his agent can relieve the principal. Payment to the agent will not relieve him, no matter if he does assume the agent has paid the consideration over to the third party. Ofttimes the purpose of undisclosed agency is to enable the principal to bind the third party to a contract that he himself could not make with him. The secrecy is solely for the benefit of the principal and the agent. It is certainly not for the benefit of the third party. If it be assumed that justice is desirable, how can it be said that principal John Doe, who has dealt openly with X through his agent, and whose agent has squandered the money given to him by Doe to pay over to X, is still liable to X; while at the same time undisclosed principal Richard Roe, who dealt stealthily and behind a veil of secrecy with X through his agent and secured a contract which he otherwise could not have secured, is not liable to X because he gave the money to his agent and the agent squandered it? To simplify the illustration: Assume P employs two agents, each to purchase 100 bales of cotton for him from T. Agent A is to disclose the fact of agency for P, while agent B is to keep the agency a secret. Each agent purchases 100 bales from T. P then gives to each agent the money to pay T for the cotton he has purchased. Both A and B go to the races and lose the money. According to the well-recognized rules of agency P is still liable to T for the cotton purchased by agent A; but, so goes the dictum, he is not liable to T for the cotton purchased by agent B; the reason for thus escaping liability in the case of B being that he withheld from T the truth at the time of entering into the contract—namely, that B was his agent. The suppression of truth thus has its reward, and the followers of ill-considered dictum are vindicated.

Another major exception to the general rule, and the one which causes the greatest confusion in application, is stated by Mr. Mechem in the following language:

> "The principal can not be held where, although he was not disclosed at the time of the transaction, he has since been disclosed and the other party has then, with full knowledge as to the principal and with power of choice, deliberately elected to give credit to the agent alone."[33]

It seems that there is practically no action which the third party can take prior to the acquisition of this "knowledge" which will preclude him from proceeding against the principal when he is discovered. Taking judgment against the agent without this "knowledge" has in numerous cases been held not to preclude him—unless, of course, the judgment has been satisfied.[34]

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[33]MECHEM, OUTLINES OF AGENCY (3d ed.), § 467.
[34]MECHEM, OUTLINES OF AGENCY (3d ed.), § 468.

What constitutes "knowledge" within the above exception is largely a question of fact. It is stated:

> "In order, however, to render an election binding upon the third person he must at the time of electing have full knowledge of all the facts material to his rights and to the liabilities of the several parties, including not only the fact of agency but the name of the principal."[25]

The difficulty arises when the question of "election" is under consideration.

What do the courts mean when they say the third party on discovering the existence of the principal has an "election" to hold either the principal or the agent? It has been stated:

> "Election, as used in its legal sense, is defined to be the choice of one of two rights or things, to each one of which the party choosing has an equal right, but both of which he cannot have. 1 Bouv. Law Dict. p. 520, Tit. Election. And undoubtedly the rule of law is that an election once made and pleaded, the party is concluded. 11 John. 241; Coke Litt. 146."[26]

It would thus seem that if the third party had by act or word, after discovering the existence of the undisclosed principal, indicated to either agent or principal a decision to hold one of them he would thereby be precluded from holding the other. To use a simple example, the rule means this: T sells a $100 watch to A on credit. He thereafter discovers that A was in reality acting as agent for P. T then sees A on the street and says to him: "I expect you to pay for that watch." The reasonable interpretation of this statement certainly is that T, after learning of the existence of the agency, has "elected" to hold A. Under a logical construction of the doctrine of election it means that T is ever after precluded from asserting any rights against P. He is not free to change his mind. Assume A fails or refuses to pay T for the watch. T thereupon institutes an action against A and secures judgment, which is returned

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[25] 2 C. J. 845.

[26] Bliss v. Greer, 9 Ill. 612, 617, (1880); 19 C. J. 1257. Lord Blackburn, in Scarf v. Jardine (1882) 7 App. Cas. 345, 360, stated it as follows:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

unsatisfied. The next day in the theater P, who is sitting in the row in front of T, proudly displays the $100 watch. T promptly goes to see his lawyer and informs his that P has the watch and he wants either the cash from P or the return of the watch. The lawyer must solemnly inform T that he has made his "election" to hold A and there is nothing that can be done about it. P may keep the watch, which he and A acting together secured from T, and he is under no obligation to pay T for it.

Such a result is of course no strain on the conscience or sensibilities of one schooled in the technicalities of the common law. It can be explained perfectly and logically along mathematical lines. But T has undergone no such refined process of mental warping. Form is not sacred to him. He is interested in substance. He had a watch. A and P acting together in an arrangement solely for their own benefit secured this watch from him. If left to his own devices he would have proceeded against A or P or both until he had received compensation or the return of the watch. But by a technical rule of law he was compelled to give up his right against one of these men and proceed solely against the other at his peril. This is the almost universal holding of common law courts today.[27]

It is believed that it is the injustice of this doctrine of election when carried to its logical conclusion that has caused courts to hedge about in almost every conceivable manner to construe the conduct of the third party as not amounting to an "election."

It would serve no useful purpose to recount the variety and number of acts which outside this field of the law, and in the mind of any normal person, would be considered as unquestionable proof of election, but which are held not to amount to an election as between principal and agent.[28] Certainly, one would think, commencing suit against either the principal or the agent would constitute proof of an election to hold the one sued, yet it is held not to constitute such an election,[29] though there are cases to the contrary.[30] Filing suit against both principal and agent, dismissing suit against one of them, and then stopping short of judgment against the other, has likewise been held not to constitute an election.[31] It has, however, been held that where suit was filed against both principal and agent, and at the close of plaintiff's case a motion was made that plaintiff be required to elect, a dismissal as to the agent constituted an election to hold the principal.[32]

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[27] *Supra*, note (26).
[28] 2 C. J. 844-846.
[29] 2 C. J. 845.
[30] 2 C. J. 845.
[31] 2 C. J. 846.
[32] Gay v. Uren, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742 (1909).

Certainly the whittling away of a doctrine to the point that almost every variety of act which normal men would consider an unequivocal election is construed as not amounting to an election indicates a state of disintegration which justifies grave doubt as to the fundamental soundness of the doctrine itself.

The fact is that the principal and the agent, for reasons of their own and generally with the purpose of greater advantage to themselves, have assumed a false front in dealing with the third party. T thinks he is dealing with A, but he is not. Behind A is the remote control ghost of P, who, seeing all, is unseen, and knowing all, is unknown.

When T learns that it is this strange combination he has been dealing with, he is informed that he must elect which part of it he will hold liable. If left to his own devices he would logically say all of it. But this, we are told, would do violence to great principles of the law. What principles? And if any violence is done, how insignificant is it in comparison with the violence which is regularly done in deciding nearly every case under present "principles"? Practically every case holds that acts which in any other field of the law, or in the field of common sense, would prove an absolute election are not sufficient in this field to prove an "election." The doctrine of "election" is thereby thrown to the winds and fact completely disregarded. Pursuing a cause of action against an agent to judgment in the absence of knowledge of the existence of a principal is held not to constitute an election and a bar to subsequent suit against the principal. The doctrine of merger of the cause of action in the judgment is thereby cast by the wayside.

Why is it thus necessary to do violence to great fundamental principles of the law in order to administer this doctrine of "election" in the law of agency? Because of the fundamental unsoundness of the doctrine.

One of the leading cases cited in support of the doctrine that pressing to judgment an action against a principal is a bar to a subsequent suit on the same cause of action against the agent is *Murphy v. Hutchinson.*[33] The facts in the case were briefly these: Dr. Murphy had rendered certain services to tenants on the Hutchinson plantation. He had dealt solely with W. N. Hutchinson, thinking him to be the principal. He had made out his account against W. N. Hutchinson and turned it over to his attorney for collection. The attorney then advised him that W. N. Hutchinson was only the managing agent for his mother, Mrs. Hutchinson, the owner of the plantation, and that she in law was responsible for the debt. "The attorney states that, since he had his remedy against either party, he con-

[33]93 Miss. 643, 48 So. 178, 17 Ann. Cas. 611, 21 L. R. A. (N. S.) 785 (1909).

cluded to proceed against Mrs. Hutchinson as being the more solvent of the two, which was accordingly done.[84] What then happened is clearly stated by the court in the following language:

> "Dr. Murphy was defeated in this suit, there being an adverse verdict of the jury in the justice's court. We have no possible way of knowing what considerations were influential with the jury; but, giving effect to all the presumptions that the law attaches to the action of every court, the plaintiff could not have been defeated because he had sued the wrong party, since the agency of W. N. Hutchinson was admitted, and there can be no dispute as to the principal's liability for the contracts of the agent, made in reference to the business which the agent was employed to perform. The presumption must therefore be indulged that Dr. Murphy was defeated in this suit because the jury was not satisfied as to the merit of plaintiff's demand, considered entirely apart from any question of which party was the responsible one. After this first suit was finally disposed of, Dr. Murphy brings a second suit upon the identical account litigated in the first action, but against W. N. Hutchinson, the agent, relying upon the fact that he had made the account without disclosing the agency."[85]

The first case, it may be stated, conceded the identity of principal and agent and held that Dr. Murphy had no cause of action against either. The question of agency was really not involved. The question under consideration was, granting the truth of all the allegations of Dr. Murphy, did they constitute a cause of action against principal or agent? The jury held that Dr. Murphy did not have a cause of action. It would be extremely difficult to find a clearer case of decision solely on the merits. Dr. Murphy had had his day in court and it had been decided that he had no cause of action—and this no cause of action had been merged in a judgment of zero.

In the case decided by the Supreme Court of Mississippi Dr. Murphy had proceeded to bring forth this old ghost cause of action, which had been merged in the judgment of zero, and assert it against the agent.

The question before it, as stated by the court, was as follows:

> "We are therefore confronted with the question whether a creditor, free to sue either principal or agent, who elects to proceed against the principal, with full and correct knowledge both of the facts and the law governing his case, can, after prosecuting

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[84] 21 L. R. A. (N. S.) at page 787.
[85] 21 L. R. A. (N. S.) at page 787.

his case to judgment, bring another suit against the agent upon identical account first sued on."[36]

Might not the court very well have disposed of the case along the following line of reasoning, to use the $100 watch illustration previously stated:[37] "Dr. Murphy (T), you state that you gave a watch to A. In a prior case you sued P for the value of this watch, basing your right of action on the unquestioned rule of law that the principal is liable on the contracts of his agent entered into pursuant to his authority. Your cause of action was based on your statement that you gave a watch to A. It was there conceded that P would have been liable if the watch had been given to A. The case was tried and it was the verdict of the jury that you had never given a watch to A. You are therefore asking this court to ignore the fact that the jury examined your case thoroughly and found that you gave no watch to A and let you again contest the question on identically the same testimony that you introduced before. The fact has already been judicially determined. Case dismissed."

The result in *Murphy v. Hutchinson* is obviously sound. It was a decision on the merits of the controversy. T had given no watch to A or to P. Might not the court, therefore, have modified its statement of the question before it by inserting the clause "wherein it has been determined on the merits that no cause of action existed" after the last comma?[38]

It has been held in a number of cases than an agent and his undisclosed principal may be joined as defendants in an action on a simple contract.[39] The plaintiff, however, in such cases has been required to elect which of the parties he would hold prior to judgment.[40] Would not the entire matter be simplified and justice be furthered by permitting a joinder of principal and agent as defendants, and judgment against both, which judgment should stand against both till satisfied?

Instead of the present rule in which truth, justice and otherwise respectable rules of law are distorted into grotesques beyond recognition, would it not be well to adopt substantially the following:[41]

When a third party who has dealt with the agent of an undisclosed principal discovers that principal he may hold him liable to the same ex-

[36]21 L. R. A. (N. S.) at page 788.

[37]*Supra,* illustration given.

[38]*Supra,* note (36).

[39]Mussenden v. Raiffe, 131 Ill. App. 456 (1907); Young v. Garlington, 31 S. C. 290, 9 S. E. 960 (1889); Tew v. Wolfsohn, 38 Misc. 54, 76 N. Y. S. 919 (1902), affirmed in 77 App. Div. 454, 79 N. Y. S. 286 (1902); Pittsburgh Plate Glass Co. v. Roquemore (Tex. Civ. App.), 88 S. W. 449 (1905). See also 2 C. J. 845.

[40]Gay v. Uren, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742 (1909).

[41]It is realized that the rule can be more accurately stated. At the same time it is thought there will be no doubt in the mind of any reader as to its substance.

tent as if the agency had been disclosed at the time of contract, without in any manner releasing the liability of the agent. But this joint, or joint and several, liability shall not exist:

1. Where in an action against either agent or principal it has been decided in a judgment on the merits that the third party had no cause of action growing out of the transaction;[42] or

2. Where, after discovery of the principal, the third party has so conducted himself as to lead the principal to believe that settlement has already been made by the agent, and in reliance thereon the principal has so changed his position that it would be inequitable to hold him.[43]

It will be contended by some that to adopt such a rule would do violence to well-established principles of the law. The violence thus done would be no greater than that at present done in administering the so-called existing rules, many of which arose in mere dictum and still have nothing but dictum to support them. In this connection it is not amiss to point out that the courts of one jurisdiction are not bound to follow the mistakes of some other jurisdiction. They are free to ignore those mistakes and in cases of first impression in their respective jurisdictions to decide as they think best. There is therefore no condonation for blindly following dictum.[44] The outstanding jurists of each age have been those whose efforts have been trained upon substantial justice, and who at every opportunity wiped out technicalities that stood in the way of the achievement of that substantial justice; while their brothers who believed in the sanctity of technicalities have long since been consigned to the limbo of forgotten men. Rules of law should be made for the attainment of justice; justice should not be the mere accident of the application of rules of law.

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[42]This is illustrated by the identical fact situation presented in Murphy v. Hutchinson, *supra,* note (33).

[43]This is the English rule as set forth by Parke, B., in Heald v. Kenworthy [*supra,* note (11)] and followed in Irvine & Co. v. Watson & Sons [*supra,* note (15)].

[44]This much-overlooked freedom which courts possess to exercise their own independent intelligence is set forth by Mr. Justice Holmes in his dissenting opinion in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 533-534, 48 Sup. Ct. 404, 409, in the following language:

"Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite

authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. . . . But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. . . . It may be changed by statute . . . as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. . . . Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide."

FEDERAL BANK DEPOSIT INSURANCE§

A. B. BUTTS*

On December 17, 1907, the State of Oklahoma put into operation a bank-deposit guaranty law. After 1907, seven other states enacted guaranty laws.[1] Guaranteeing bank deposits became an important question for discussion in states other than the eight which had enacted legislation.[2]

After extended trial, all eight states have repealed the deposit-guaranty laws by legislative enactment.

Experience under the guaranty laws has been quite similar in several states. "Generally," reports that Federal Reserve Board, "the laws seemed to work well for a period, winning popular favor by providing for prompt discharge of all deposit liabilities for failed banks." This Board, in its Report, asserts further: "Generally the laws have been commended from year to year by State bank commissioners or superintendents in their annual reports as providing precisely the guaranty originally intended; and generally also . . . bank failures have piled up obligations against the funds in excess of resources immediately, or in some cases, as it would appear, ultimately available under the law, with the result that those administering the fund have resorted to borrowing . . . or to the issue of certificates of indebtedness to depositors."[3] The ten years that have elapsed since this statement was made serve only to emphasize the truth of this observation.

A critical situation in the banking business called forth bank-guaranty laws in the eight states which enacted legislation. In Oklahoma the events leading up to the enactment of the law have been described:[4]

> "The idea was born in Oklahoma in the very throes of the panic of 1907, after the shortest period of gestation. The panic, it

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§ For discussions of the state bank-deposit guaranty laws by the same author, see *State Regulation of Banking by Guaranty of Deposits,* 2 MISSISSIPPI LAW JOURNAL, 208-227, November, 1929; and *Guaranty of Bank Deposits in Eight States,* 3 MISSISSIPPI LAW JOURNAL, 186-202, February, 1931.

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[1]Kansas, 1909; Texas, 1910; Nebraska, 1911 (law enacted in 1909, but suspended by injunction bill until 1911); Mississippi, 1914; South Dakota, 1915; North Dakota and Washington, 1917.

[2]Arizona, Arkansas, Florida, Georgia, Tennessee, Iowa, Wisconsin, Missouri, Colorado, Nevada, Minnesota, Montana and North Carolina. About a century ago New York State enacted a law providing a safety-fund plan, covering deposit liabilities along with all debts of banks, but the plan was devised particularly for the protection of note holders rather than of depositors; see Federal Reserve Bulletin, September, 1925, 11 Fed. Res. Bulletin, p. 625.

[3]Federal Reserve Board, September, 1925, p. 626.

[4]By A. Piatt Andrew, YALE REVIEW, July, 1913, pp. 599-600; quoted by Thomas Bruce Robb in his book, THE GUARANTY OF BANK DEPOSITS (1921) p. 22.

> will be remembered, began October 28, 1907, and it was not until three weeks later, on November 16, that Oklahoma became a state, and that its first legislature began its sessions. Nevertheless the panic was not yet over; currency was still at a premium and clearing-house certificates were still outstanding throughout the country when the Oklahoma legislature passed its famous law. The first legislature of a new state had been in session only four weeks when, on December 17, it adopted with scarcely any debate a law without precedent in any other country, and with but one dimly remembered, unsuccessful precedent in the United States—a law which nevertheless presented what was probably the most far-reaching and drastic experiment in banking legislation that had been made anywhere in the world for at least two generations."

Proposals for Federal bank-deposit insurance have been made from time to time.[5] Early in 1933, the chaotic situation in the United States brought this subject forward again. Unemployment extended to millions of men and women; industry was at a standstill; agriculture was stagnant. With a banking collapse threatened, drastic action seemed unavoidable.

From 1920 to 1933, more than 14,000 of the 30,000 banks in the United States had closed their doors. Four billion, five hundred millions of dollars were tied up.

The Banking Act of 1933 was passed directly after the "banking holiday" period declared by President Roosevelt. In order to furnish a basis for checking facilities so fundamentally necessary to the American business system, quick restoration of confidence in the banks was the fundamental need of the situation.

Faith in the banks followed swiftly upon the establishment of the Federal Deposit Insurance Corporation.[6] The security of deposits is the heart of the public's relation to banks. The sanctity of deposits assured, deposits began immediately to mount.

The officials of the Federal Deposit Insurance Corporation realize that to promote the safety of savings, they must become promoters of good banking.[7] This they have endeavored to do; they realize that it will be well if in deposit-insurance the social forces than insurance arouses in other fields may be set at work. Preventive work for life extension, stricter building laws, and the like are obvious results of insurance.

Federal deposit-insurance became effective January 1, 1934. In August, 1934, it could be said that "insured deposits of four banks which have

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[5]See GUARANTY OF NATIONAL BANK DEPOSITS (pamphlet), FORGAN, quoted by ROBB, THE GUARANTY OF BANK DEPOSITS, p. 193, wherein a Chicago banker lists the stock objections to bank-deposit guaranty laws, as held by many bankers.

[6]See section 12B of the Federal Reserve Act as amended by act of June 16, 1934, § 1 (Public, No. 362, 73rd Cong.) for the F. D. I. C., especially section (d) on the capital stock of the Corporation.

[7]See addess of Leo T. Crowley, Chairman of the Board of Directors, F. D. I. C., before the American Bankers' Association, Washington, D. C., October 23, 1934, published by the F. D. I. C.

been closed since the Corporation went into operation were being paid on August 1."[8] And further, "It was estimated that 99 per cent of their depositors would be paid in full."[9]

The Federal Deposit Insurance Corporation was established by the Act of Congress approved June 16, 1933. It is a corporation created for insuring bank deposits. The Corporation is controlled by a board of directors of three members. Two are appointed by the President by and with the advice and consent of the Senate. The other member is the Comptroller of the Currency, who serves ex-officio. Not more than two directors can be from the same political party.

If a depositor knows that his deposits are adequately protected against loss in the event of bank failure, he will not withhold his money from banks. To give this assurance to depositors, a maximum amount of $5,000 is insured under the present law for each depositor. It is estimated[10] that over 97 per cent of all bank depositors in the United States are fully protected by the $5,000 maximum.

The Temporary Federal Deposit Insurance fund was created by payments from insured banks. By the act of Congress the temporary fund is to continue until July 1, 1935, when it will be replaced by the permanent plan. The permanent plan will be administered by the Federal Deposit Insurance Corporation.

The cost of deposit guaranty laws of the states was assessed against the banks themselves. The sources of moneys under the permanent organization of the Federal deposit-insurance plan will be as follows: a subscription from the Treasury of the United States of $150,000,000; a subscription from the Federal Reserve banks of about $140,000,000; and payments by insured banks.[11]

In August, 1934, the Fund amounted to $320,000,000 and was being held in cash or invested in United States Government securities. The Corporation may also issue its bonds to the Reconstruction Finance Corporation to the amount of another $250,000,000.

All banks which are members of the Federal Reserve System (which includes all national banks in the United States and some State banks) are required by law to join the Temporary Federal Deposit Insurance Fund. State banks not members of the Federal Reserve System are free to apply for insurance or not as they choose. The great majority of them are now insured.[12]

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[8]Circular No. 1, August, 1934, F. D. I. C.
[9]*Ibid.*
[10]See reference 7, above.
[11]See reference 6, above.
[12]The F. D. I. C. Report of October 1, 1934, shows that in Mississippi 203 commercial banks reported "ratio fully insured to total accounts, 99 per cent," and "ratio insured to total deposits, 65.55 per cent."

When a bank is closed through inability to pay its depositors, the Insurance Corporation makes the insured portion of the deposits immediately available. A new national bank is immediately set up by the F. D. I. C. to pay the insured depositors of the closed bank. The closed bank is placed in liquidation. If it be a national bank, the Comptroller of the Currency appoints the Corporation the receiver. If it be a State bank, the Corporation may or may not be appointed receiver, depending upon whether the State law authorizes such appointment and depending upon the discretion which may be exercised by the appointing official. To facilitiate liquidation, the Corporation may purchase the assets of the closed bank if it be a member of the Federal Reserve System.

The Corporation pays insured deposits regardless of the reason for the failure of the closed bank, for, since the purpose of deposit insurance is to prevent loss by depositors, the reason for the failure does not influence the Corporation's liability.

All types of personal and corporate deposit obligations, deposits of public funds, and deposits of other banks in insured banks are included in the plan. Trust funds awaiting investment are also included in this insurance.

Five thousand dollars is the insured limit for one depositor, and all amounts up to and including that are fully insured. Accounts larger than that are insured up to $5,000.

Many interesting questions arise in connection with the matter of what types of accounts are insured. For example, if the books of a bank show that a husband and wife each has an individual account, and, that they have, in addition, a joint-account, does each of these three accounts come under the benefits of the insurance, and are they considered separately in determining the amount due under the insurance limit? The Corporations answers: "Yes; if the accounts are in fact owned as shown on the bank records. In the case of the jointly owned account, however, the right of survivorship must have been provided."[13]

Again, if an estate of $20,000 is being held in a closed bank, and there are four heirs to share equally in it, is the account thus fully insured? The Corporation answers: "If the title to the account states the names of the four heirs and specifies that they are to share equally, the account is separately owned in four equal undivided parts and the individual owners are fully protected. If the title is not so held the account is considered as a unit and the amount papable by the Insurance Corporation is limited to the maximum of $5,000."[14]

And again, would it be possible to take four equal negotiable certi-

[13]F. D. I. C. circular No. 1, August, 1934, p. 8.
[14]*Ibid.*

ficates of deposit for an account of $20,000 and thus procure full insurance? The answer give by the Corporation in this instance is: "No. This would cause their holder to be an owner in the same right and in the same capacity and, hence, his insurance claim would be limited to $5,000. If after taking them out the original owner subsequently transferred them to four separate persons in the usual course of business, each of those holders would, however, have an insured claim."[15]

Banking is a public business,[16] even though bankers look upon banks primarily as sources of profit. Since both the banks and the public are large beneficiaries, both should bear the cost of deposit insurance. In this age of insurance, by the Federal deposit-guaranty law, the principles of insurance have been extended to this field of human risk.

The idea of creating a guaranty fund in part from a general governmental tax levy has much to recommend it. In his very illuminating book,[17] Dr. Thomas Bruce Robb observed some years ago: "But before these costs can be equitably distributed, more attention must be paid to three considerations, namely (1) to what extent the banks profit from such a law by having their deposits increased, (2) to what extent the cost has already been shifted to the public, and (3) the extent of the other mutual gains from insurance. These are hard questions, but they serve to indicate that this whole matter of the justice of bank guaranty is far more subtle and complicated than has often been supposed."

In order to administer successfully a bank-deposit insurance plan, the fundamental bases upon which any successful insurance system rests must be taken into account. This is precisely what was not done by the states which adopted deposit guaranty laws.

There can be little difference of opinion as to the desirability of giving deposit-credit security and stability; there can logically be difference of opinion only as to methods employed to attain this end.

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[15] *Ibid.*, p. 9.
[16] See, Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 341 (1911).
[17] THOMAS BRUCE ROBB, THE GUARANTY OF BANK DEPOSITS, 198.

JUDAH P. BENJAMIN; LAWYER AND STATESMAN

GABE JACOBSON*

Having been requested many times by prominent lawyers of the bar of Mississippi to write this sketch, and being an admirer of the memory of that most illustrious lawyer and statesman of the Old South, whose learning, ability, character, and generous spirit have always been idolized by me, I have decided to offer this, a short sketch of the life of Judah P. Benjamin. My wish, dear reader, is for you to allow yourself to wander with me to the distant past in a recital of some of the prominent features of his life and character.

Mr. Benjamin was an Anglo-American of Jewish descent. He was born on August 11, 1811, a British subject, on the Isle of St. Croix or St. Thomas, in the West Indies, now called Virgin Islands, formerly owned by England, and sold to Denmark, and afterwards purchased from Denmark by the United States. His parents removed from London to the West Indies in hopes of improving their fortune in the New World. They were people of education and refinement, though probably poor. A few years after the birth of young Benjamin they removed to North Carolina, and he was sent to school at the Fayetteville Academy at Fayetteville, North Carolina, a school of good repute at that time, and afterwards his father and his family moved to Charleston, South Carolina, and from which place young Benjamin entered Yale University, and attended the sessions of 1825, 1826, and 1827, but did not remain to complete his studies and graduate. His expenses at Yale were borne by a generous friend of means. His family were of ancestry, similar in strain to that of Benjamin Disraeli, the famous statesman, orator, and novelist of England, and of our own and Honorable Benjamin N. Cardozo, the learned Associate Justice of the Supreme Court of the United States. Young Benjamin's parents several times changed their residence, and finally settled in New Orleans, Louisiana. In New Orleans he served as a Notary's Clerk, studied law in private at the office of a renowned lawyer, and studied French and Spanish in private. It was while he was engaged in the study of law in the lawyer's office that he was recommended to teach English to the daughter of a wealthy Frenchman, who was a planter near the City of New Orleans, and an agreement was made by which Benjamin was to teach the young lady English and in return she was to

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teach him French. He was admitted to the Bar of Louisiana on December 16, 1832, and a few months later he married his French pupil, Mlle. Natalie St. Martin. Louisiana had been acquired by the United States from France only a comparatively short time previous, and its language and legal systems were still largely those of France and Mr. Benjamin made good use of every spare moment to prepare himself for the battles of life, and his knowledge of the three languages commonly spoken in Louisiana, together with an experience in commercial matters, made him a very strong and useful lawyer. The broadening influences of the necessary mastery of different systems of law and the acquaintenances with literature left their mark upon young Benjamin, and can be traced in his grasp of philosophical reasoning, and wide reading, to which he subsequently attained.

He began the practice of law in New Orleans, in a law partnership with Thomas Slidell and C. M. Conard, both being well known lawyers, under the firm name of Slidell, Benjamin & Conard, and his success at the bar was remarkably rapid. At first he found time, with the cooperation of Slidell, to prepare "A Digest of the Reported Decisions of the Supreme Court in the Territory of Orleans and State of Louisiana" (1834), which brought him considerable reputation. Later on he became so engrossed in the practice of law that it took up his entire time, and he soon became one of the recognized leaders of the bar of Louisiana. It was in the field of commercial law that Benjamin labored mostly. He was a tireless worker, had far more than average ability, was painstaking, and accurate to the smallest detail in getting up his cases, and possessed of great power of logical analysis, and a perfect balance of temperament, a charitable disposition, and was a delightful companion, which played their parts in not only making him a great lawyer; but also a very popular and most sought after man.

With Mr. Benjamin, as with many lawyers of this day, as soon as he became comfortable in a financial way, his thoughts and desires diverted to the open spaces, and he wished to possess a plantation. In 1840 he purchased an interest in a large sugar plantation, "Bellechasse," located below New Orleans, which he operated, and upon which he maintained a delightful country residence. However, like many lawyers of this day, he endorsed an accommodation obligation for a friend, and in time lost the plantation on the friend's default to meet the note when due. And then again, lawyer-like, politics actively interested him, and from time to time he was elected to various local offices. He was one of the most active and influential members of the Louisiana Constitutional Convention in 1844-45. He was elected to the Lower House of the State Legislature in 1842, and began his political career, in which he never met

defeat, and was later elected to the State Senate. At this time he had been a successful practitioner at the bar of the Supreme Court of the United States, and was elected to the United States Senate as Senator from Louisiana, and after a contest for his seat, in which he was successful, he entered his term as Senator on March 4, 1853. His reputation as a lawyer and statesman had preceded him and he was offered a position as Associate Justice of the Supreme Court of the United States by President Pierce, which he declined. During his senatorial career the Whig Party, of which he had always been a staunch adherent, went to pieces upon the question of slavery, and Mr. Benjamin became a Democrat, and in spite of various opposition, was re-elected to the United States Senate in 1859.

Although keeping up his interest in political life, he gave much attention to the practice of his profession, and rapidly rebuilt his fortune which he had lost. He was intensely interested in every movement for the betterment of the state, politically, socially, economically, or in a profitable business way, and successfully led a movement which resulted in the building of the Jackson & New Orleans Railroad, now the Illinois Central, and was striving desperately to promote the building of a railroad and ultimately a canal across the Isthmus of Tehuantepec. This dream of isthmian communication was very dear to Mr. Benjamin's heart. For ten years he labored unceasingly for its realization, and at one time appeared in sight of success when it fell through due to the unsettled condition of affairs in the Mexican Government.

Mr. Benjamin was always on terms of mutual forbearance with his opponents. He was kind, considerate, and extremely friendly with all with whom he came in contact or had dealings with; but nevertheless he carefully guarded his honor and self-respect, and would resent an insult whenever offered if it took mortal blows to suffice. I here give an account of an incident which took place in the United States Senate when Mr. Benjamin was representing the State of Louisiana, as Senator, and Mr. Jefferson Davis was likewise representing the State of Mississippi. This incident is taken from the biography of Judah P. Benjamin, written by Mr. Pierce Butler of New Orleans, Louisiana:

"Jefferson Davis, at that time senator from Mississippi, was in very bad health, and the distress of his disease made him irritable and impatient of opposition. During a debate on the army apropriation bill, June 1858, Senator Benjamin made a remark which Davis corrected in a very ill-natured and supercilious manner. The doughty Louisianan quietly repeated his statement in another form and Davis sneered again, adding that he considered what the former had said as an 'attempt to misrepresent a very plain remark.' There were more words which did no

credit to Mr. Davis, and which gossip reported in less agreeable style than we find them in the official report of the Congressional Globe. He completely lost his temper, while Benjamin, resenting what had been said, maintained his position, in a dignified way, and declined to pursue the subject further in the Senate. Of what followed the Globe in its account of Davis' apologetic explanation before that Body, gives only a hint.

"As is quite well known, there was only one way of arranging such matters between gentlemen in those days, and accordingly rumor reported all sorts of thing about the duel involving the two leaders. The most accurate account is that furnished in some private notes which were taken by Benjamin's warm friend, Thomas F. Bayard:

"'Benjamin peremptorily challenged Jefferson Davis for rude language in debate, and brought the note to my father in the session to be copied and delivered. My father handed the note to Davis in the cloak room of the Senate. He read it, and at once tore it up , and said: 'I will make this all right at once. I have been wholly wrong; (he) walked back to his desk in the Senate, and on his first opportunity arose and made the most distinct withdrawal of what he had said, and regretted any offense most amply. No one in the Senate but my father knew what had called forth from Davis this apology; for Benjamin had sat down in silence when Davis had made the rude interruption. But writing instantly at his desk, Benjamin called him to account by the note, which contained a direct challenge, without asking for a withdrawal or explanation. When the temper of the time is considered, the character of the two men is strongly illustrated.'

"Benjamin's unfailing sauvity, his gentleness, his very looks deceived many people into thinking him deficient in courage; but he would resent an insult as readily as any blusterer. Fortunately for all parties, Mr. Davis had no need to fear any misconstruction of his motives, and made the sort of amends that only the truly courageous can make. Benjamin accepted the explanation in a few simple words, stating that he could conconfidently appeal to his brother senators to bear him out when he said that he had always striven to be courteous and patient of difference of opinion; that he had been hurt by the asperity in the tone and manner of one whom he respected and admired; but that he would be very glad to forget all between them 'except the pleasant passage of this morning.' Thus simply closed an incident whose like was, with less happy ending, too sadly frequent in Congressional annals."

No doubt that this incident caused these two gentlemen to respect each other the more, and it is thought that it ripened into an intimacy

and cemented a lasting friendship between these two most elegant gentlemen.

Mr. Benjamin was best known as a brilliant lawyer, elegant orator, forceful, and logical debater, and these qualities were displayed to a great degree in the many debates between the North and the South in the United States Senate just prior to the outbreak of the war between the states. True to his convictions, Mr. Benjamin became known in the Senate as one of the ablest exponents of the Southern viewpoint upon slavery and the constitutional guarantee of states sovereignty. From the very beginning he recognized the inevitableness of the Civil War, and that the issues of such a war were unfortunate for the South; but he also well recognized that the South in the very honor of the controversy could not give up in the struggle in what he and the South regarded as her rights under the Constitution, and consequently he became one of the foremost advocates of the South's cause.

On the formation of the Confederate States of America, he was appointed Attorney General (February 25, 1861) to which position was added that of Acting Secretary of War (September 17, 1861). On November 21, 1861, he became Secretary of War, resigning the portfolio of Department of Justice, and he retained this position until March 17, 1862. His administration in the War Department was not so successful, and he was severely criticized and censured by the Confederate Congressmen for the loss of men and property in two battles, but President Davis, realizing that his acts were blameless, appointed him Secretary of State, the duties of which office he began on March 17, 1862, and retained said office until the collapse of the Confederacy in 1865. For the duties of Secretary of State he was admirably fitted in every way. He was the most influential member of President Davis' official family, and it is reliably said that he wrote the President's messages when other duties filled the time of the Executive. His ability in this position, and influence as Secretary of State, were world-widely known and recognized. The History of the United States by J. W. Garner (a Mississippian), and Henry Cabbot Lodge of Massachusetts, in writing of Judah P. Benjamin, has this to say: "He possessed remarkable industry and administrative ability, and was often referred to as the 'brain of the Confederacy.'"

Mr. Benjamin identified himself always with the struggle and with the Confederate administration. He was personally devoted to Mr. Davis and probably had more influence with him than any other man.

At last when all hopes were shattered and the certainty of the fall of the Confederacy was imminent, and defeat stared them in the face, Mr. Benjamin, accompanied by Mr. Davis, traveled together in retreat from Richmond until they reached Vienna, near Washington, Georgia.

In giving an account of his retreat, Mr. Benjamin wrote his sister in New Orleans on July 22, 1865, and among other things he said the following:

"I heard of the proclamation in which a large reward was offered for the capture of the President, who was most outrageously accused of having connived at the assassination of President Lincoln. Everything satisfied me of the savage cruelty with which the hostile Government would treat any Confederate leader who might happen to fall into their hands, and I preferred death in an attempt to escape from such captivity as awaited me if I became their prisoner."

Of date August 1, 1865, he wrote to his sister as follows:

"We are all in intense anxiety on the subject of our honored and noble Chief, Jefferson Davis. By the last account, there was every possibility that those in power at Washington would succeed in getting rid of him by the tortures inflicted on him in prison, and that the delay in trying him was intended to give time for this moral assassination. No nobler gentleman, no purer man, no more exalted patriot ever drew breath, and eternal infamy will blacken the base and savage wretches who are now taking advantage of their brief grasp of power to wreak a cowardly vengeance on his honored head."

Mr. Davis refused to flee from the country, but Mr. Benjamin, disguised as a farmer, made his way to the Florida coast, escaping to Bemini Isle in an open boat, and thence encountering great peril and hardship, to Nassau, and thence to Havana, and then to St. Thomas, and last to Liverpool. Mr. Benjamin's voyage to the West Indies was in a small boat, and very perilous, and on his trip from Havana to Liverpool his vessel had an unfortunate fire, but he reached Liverpool safely after a most perilous voyage four months after his separation from Mr. Davis. This escape of a man of his age, use to a sedentary life, shows remarkable stamina.

It was thought that Mr. Benjamin arrived in England penniless, as many have said; but it will be remembered that shortly after he arrived in London to begin life anew, he wrote back to one of his relatives in Louisiana that his six or seven hundred bales of cotton which was on its way to England had shrunk to 100 bales, and was safely at sea on the way to England, and would be the means of his living for two or three years and he was quite easy for the time being with good possibilities ahead.

Mr. Benjamin's change of residence, situated as he was, is another exemplification of the undaunted courage, pluck and character that constituted his make-up; a man now fifty-five years of age, beginning the

practice of law anew in a strange and foreign land; removed from his friends, and in England where the procedure and rules of law were so different from the civil laws of Louisiana, where Mr. Benjamin was nurtured in the laws of France. Having decided to become a permanent resident of England, Mr. Benjamin began his work, and at first submitted articles to newspapers and magazines, which were well received, and amply paid for. As soon as spring opened he started to looking into requirements for admission to the Bar, hoping to take up his studies at once. On January 13, 1866, he entered as a student at Lincoln Inn, and shortly afterwards was admitted to "read law," under the instruction of Charles Pollock, later Baron Pollock, who accorded him the most considerate and kind treatment, and also often entertained him at his country home at Hatton. The Metropolitan Police, for which Baron Pollock was counsel, sent him a paper, asking his opinion as to the searching of prisoners, involving the right of the police to search prisoners in their custody before they had been convicted of any crime. When the papers were handed to Baron Pollock he was in the act of leaving for court, and being in a hurry, he threw the papers to Benjamin for attention. Mr. Benjamin took the papers and set to work on his brief, and soon submitted a written opinion, answering the questions asked in a learned way, well fortified by authorities. It is said that this opinion rendered by him still remains the rule and guide for the police at their Home Office, being considered a masterpiece on the subject.

Mr. Disraeli was living in England, at the height of his career, when Mr. Benjamin arrived there, and these two great men being of different countries and with a similar ancestry, the writer has been most interested in learning of their meeting, relationship, and intercourse, and has been industrious to find some account of their association, without avail. The only thing of interest that he has been able to gather in this regard is that Mr. Disraeli was absent from England at the time of Mr. Benjamin's arrival, and Mr. Benjamin, in a letter written to America with reference to same, relates the following:

> "Mr. Disraeli also wrote to a friend of mine expressing desire of being useful to me when I should arrive in town, and I have been promised a dinner at which I am to be introduced to Gladstone and Tennyson as soon as the society opens here."

Whether Mr. Benjamin and Mr. Disraeli ever met, the records are silent. The writer does, however, find that Mr. Benjamin became an intimate friend of his political idol, Gladstone, and had the felicity of dining with him.

In England Mr. Benjamin's industry and varied learning and experience in all the branches of commercial law was soon solicited by the

profession and the laity. His great intellectual power and clear perception of the essential rule and practical knowledge and application of the law of the sale of personal property brought him fame on the completion of a treatise styled, "The Law of Sale of Personal Property," commonly known as "Benjamin on Sales," which has from its appearance to this day been held as a legal classic on the subject on both sides of the Atlantic. A few years ago the writer of this sketch was conversing with a young law graduate of Oxford, England, a former Rhodes scholar. The question was asked the graduate as to what the English bar thought of American legal textbooks. The graduate replied that they were not considered accurate and thorough, except, he said, "There is an exception, and that is 'Benjamin on Sales,' which is studied at Oxford to this very day." It can well be said that it is still universally held as authority on this subject.

Mr. Benjamin's practice of law began to grow rapidly in England, and his prominence at the bar was really remarkable. He rose so rapidly and maintained his position so steadily and firmly that he became one of the foremost lawyers at the English bar. In 1872 he was made a Queen's Counsel, and his wrecked fortune was soon repaired. In 1867 his yearly income from his practice was $2500.00, and this rapidly increased until at the time of his retirement from the Bar in 1883, it had reached a yearly income of $100,000.00, which was really a very large income for a British advocate of that day. The close of his remarkable career was celebrated at a great banquet tendered him in London by the members of the English Bar, an honor never before accorded, and upon this occasion memorial tributes were paid to him, both as a man and a lawyer, by the foremost representatives of the bar, where he had won fame and a new fortune.

As a man, Mr. Benjamin was kind in disposition, loyal to his friends, exceedingly generous, and ready to help. As an orator, he was simple and unaffected in delivery as in style. His voice was notably sweet, clear as a bell, and his perfect modulated voice and careful enunciation made it easy to follow him, despite the great rapidity with which he habitually spoke. As a lawyer, he was profound in legal and classic learning, and most noted for his power of logical analysis and clear statement of the main issue of his cause, which carried conviction at once to his hearers.

After his retirement from the English bar he removed to Paris to spend the remainder of his life with his wife and daughter, who had been living there for a long time. Though overcome with disease he spent his last days happily with Mrs. Benjamin and his daughter and his daughter's husband, Captain De Bouisignac. On Tuesday, May 6, 1884, this great and kind gentleman passed to his last reward at his mansion in Paris. Mr. Benjamin became domiciled in France, and died there. "At

first some doubt was felt as to where his will should be proven either in France or England. In view of the insistency in its phraseology of his residence in Paris, he evidently meant that place to be his domicile." But it was discovered that a statute, which he doubtless hand in mind, provided that "the will of a British subject domiciled abroad, may be proved in England without any proceedings in the foreign country." "Hence all difficulties were removed."

"It was a curious fact, noted by legal writers at the time, that he was all his life a British subject, had been a Senator of the United States and a Confederate Attorney General, became domiciled in England, and died a domiciled Frenchman."[1]

Mississippians have honored his memory and placed in a prominent place in the Department of Archives and History of the State of Mississippi, at Jackson, a lifesize oil portrait of him.

To us of the southern part of the United States, who revere its history, he will always be remembered as a true and noble gentleman of the Old South.

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[1]Data for this sketch were obtained from personal conversations had with my relatives who were acquainted with Mr. Benjamin in his life time and the many histories and articles I reviewed. I especially acknowledge my indebtedness for the great help I derived from that magnificent book—Judah P. Benjamin, by Mr. Pierce Butler of New Orleans (1907).

DRAFTING A DEED

J. W. DULANEY*

The Mississippi Code gives us a form for deeds and makes a few words effective to express the five common law covenants,[1] and we properly regard the drafting of a deed as one of the simpler matters of practice. However, it actually involves a greater number of considerations than we are usually aware, and in reviewing some of these, we hope the younger practitioner may find suggestions of value and that the older one may be interested in a summary of those things which he has been doing more or less subconsciously.

The necessity for professional service arises from the lack of special knowledge on the part of the client; and the service is not complete unless the client is given a fair understanding of the transaction and his attention directed to those matters which he should consider in connection with it. Title to real estate passes by the execution of a deed. The executed deed is the evidence that title has passed, and is a contract between the parties. It is sometimes a receipt for money and sometimes the evidence of a lien. It is a thing which has accomplished intentions of the parties arising from a prior agreement which generally had no legal effect. Often these intentions are somewhat vague and it is a rare client who furnishes without questioning all of the information which the draftsman should have. In a large number of cases that questioning will disclose that the parties have not reached an agreement as to one or more of the details which should have been considered.

Perhaps the most frequent of these is the matter of current taxes since it does not occur to the client that taxes not due constitute a lien.[2] If the trade occurs during the early part of the year, the vendee will generally assume the taxes, and if it occurs toward the close of the year, the vendor will generally assume them and frequently the parties will agree on pro-rating when the transaction is in the middle of the year. If the property is leased by the year similar arrangements may be required as to rent. These are matters for trading between the parties but they should be called to their attention before the deed is prepared. The matter of unmatured paving assessments, drainage assessments and other special assessments should also be mentioned and particularly where the only client is the vendor as it is an unfortunate mistake to permit him

*Member of the Bar of Tunica, Mississippi.

[1]MISS. CODE ANN. 1930, §§ 2122, 2123, 2126, 2131.

[2]Martin v. Partee, 121 Miss. 482, 83 So. 673 (1920).

to warrant against a lien of this nature contrary to his intention.[3] If the vendor is assuming current taxes or assessments or any part thereof and the vendee or both parties are represented, the matter of securing performance by the vendor should be mentioned so that the vendee can decide whether he is willing to risk the personal responsibility of the vendor or whether some part of the purchase price should be placed in trust or other arrangement made to secure the undertaking.

At the outset it is proper to inquire what, if any, title responsibility the parties expect the attorney to assume. It is surprising to note how many persons fail to realize that the writing of the deed does not necessarily involve an investigation of title and will feel perfectly secure as to their titles because at one time or another some lawyer possessing their confidence has written a deed covering the property. Mention of this is necessary only when the vendee or both parties are represented and in the latter case it is well to reach an understanding as to which of the parties is to pay the fees and expenses or how they are to be divided. The expenses will ordinarily be the amount required for revenue stamps, acknowledgments and recording. When the parties are close traders this sometimes presents some difficulty even in transactions involving such sums as to make these items seem negligible. These things are all matters for trading but the attorney can sometimes be helpful by suggesting that it is customary for each party to pay for stamps and acknowledgments on the instruments executed by him for recording on the instruments delivered to him.

It is well to make inquiry as to the present occupancy of the property to be conveyed, so that, if necessary, proper provision can be inserted retaining possession until a given time or making the conveyance subject to such rights of occupancy as may be outstanding in other persons. If the property is a farm it may be proper to make a reservation of the right in the vendor to complete the gathering and removing of crops and it is usual to add that this shall be done in such manner as not to interfere with preparations for the crops of the succeeding year.

If the property consists in part of insured buildings the parties should be advised of the necessity for making immediate change in insurance policies. Frequently money can be saved by having policies transferred instead of cancelled and in that case there may be an adjustment of the cash paid on account of unearned premiums on the transferred policies.

The description of the land, of course, should be definite and accurate and since in every case the property should be shown to be situated in a certain county and state, the draftsman usually forms the habit of naming these in a particular place in all deeds, either immediately preceeding or

[3]Robertson v. Singleton, 156 Miss. 220, 125 So. 421 (1930).

following the remainder of the description. Section, township and range or the name of the municipality and correct name of the sub-division must be inserted and the remainder of the description should be worded as definitely as the draftsman feels he would require if he were buying the property himself and had to locate the lines. A distance should not be "more or less" unless it is between monuments that can be located or points that can be located from monuments and the nature of the monuments themselves should be considered. In copying old descriptions changed conditions should be borne in mind as, for instance, where a reference is made to the line of property occupied by a certain person who may no longer occupy the property, or where a monument has disappeared or has been moved. When metes and bounds are required, the draftsman should always mentally trace these out to be sure that he can return to his starting point by taking the directions and distances he has described, and except in the simplest cases a rough plat should be drawn. An erroneous description sometimes seen is "the middle one-third" of a rectangular tract which is generally intended to mean either the South half of the North two-thirds or the West half of the East two-thirds. Descriptions taken from tax receipts are frequently imperfect. When several fractional parts of a section are conveyed there should be no hesitancy in inserting the section number as often as clarity requires; for illustration, the North Half of Section ten and the Southeast Quarter of the Southwest Quarter of Section ten, instead of the North Half and Southeast Quarter of the Southwest Quarter of Section ten.

It is good practice in many cases to follow the particular description with a general description such as "being the property occupied by the grantors as a home," or, as "being the land conveyed to the grantor by a certain deed described."[4] It may be observed that those lawyers who are least apt to let pass an error in particular description are more careful to guard against the effect of an error by including a general description.

Unless they are questioned, the parties very often overlook such easements as roads and rights-of-way for levees, drainage canals, railroads, telephone lines, telegraph lines, power lines and gas pipe lines. Generally these exceptions should be so worded that the reversion and any other rights of the grantor with reference to the rights-of-way will be conveyed. The vendor is of course more interested than the vendee in seeing that descriptions of exceptions are accurate.[5]

Statements of the consideration may be mere recitals, which can be explained by parole evidence, or may be contractual,[6] and if the considera-

[4]Miss. Digest—Deeds—§ 111 *et seq.*
[5]McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1894).
[6]Baum v. Lynn, 72 Miss. 932, 18 So. 428 (1895); Thompson v. Bryant, 75 Miss. 12, 21 So. 655 (1897).

tion is stated at all it should be stated definitely, giving the amount of cash paid and if there are notes they should be completely described so that they can be identified and the notes themselves should contain some reference to the instrument. If the parties have some reason for wishing not to disclose the consideration and in the deed recite merely "a valuable consideration" it is well to have them sign a separate paper describing it. If there actually are no "other valuable considerations" the insertion of these words may invite trouble. If some part of the consideration is the assumption of a payment to a third party the draftsman should bear in mind the final elimination of the implied vendor's lien in favor of such party. We sometimes see deeds reciting the assumption of the grantor's debts without naming the creditors or the maturity of the debts and in such cases it is very difficult to make a satisfactory showing that the lien has been extinguished.

The implied vendor's lien in favor of a third party is tricky and sometimes slips in so as to produce an effect which no one has contemplated.[7] The person who, in one transaction has purchased two tracts of land, assuming the mortgage debt on one, and the other being unencumbered, may find that he has no unencumbered property by reason of the fact that his assumption of the mortgage has extended the mortgage lien to the tract previously clear of debt. Or where personal property and land are transferred by the same instrument, the purchaser may find that a thirty year farm loan has been included as a part of the purchase price of his mules and implements giving rise to a lien thereon. Or where several tracts are conveyed subject to separate mortgages it may be found that the mortgage liens have all been expanded to cover all of the property. These results can be easily avoided by inserting proper provisions showing the separate considerations for each piece of property or recitals showing that a designated encumbrance is assumed as part of the consideration for the encumbered property and no part of the consideration for the remainder of the property.

In naming the parties it is well to bear in mind that there are sometimes title examiners who may be curious to know whether Alexander Ferdinand Smith, Alex F. Smith and A. F. Smith are the same person; and abstractors and title examiners should feel some gratitude toward those draftsmen who have been careful to see that the grantor is named in the deed, acknowledgment and signature in the same manner as in the instrument by which he acquired title; or if the name has changed by reason of marriage or a different signature adopted, that a recital has been included showing the identity. They may also be grateful if the marital status of the grantor is shown and if, in case of property which

[7]Lee v. Newman, 55 Miss. 365 (1877).

has passed by descent, the instrument contains recitals to show that the parties acquired full title in that manner. Mention of the place of residence of the grantor or a recital that the property is not his homestead, when such is the case, may be helpful and where title is known to rest largely on adverse possession, recitals setting forth the facts furnish a means of obtaining a permanent record as to those facts.

When other than title in fee simple absolute is to be conveyed the rule that "if there be any deed earlier clauses which are repugnant and inconsistent with the later ones, the former shall prevail" should be kept in mind and if the limitations are such that they cannot conveniently be stated in the granting clause at least reference should there be made to them.[8] When the grantor conveys an estate to be enjoyed after his death care must be taken to keep the instrument from appearing to be testamentary in character.[9]

Acknowledgments should present little difficulty as the forms supplied by statute can easily be adapted to fit the circumstances. The careful draftsman will usually see that the instrument is correctly indorsed on the back for the guidance of the clerk in recording and so that it can be identified without unfolding. Trust deeds are not within the scope of the present discussion but it is suggested that when they secure purchase money notes, the notes should be described as such, so that cancellation of the trust deed may show extinction of a vendor's lien in the accompanying deed and when it is desired as a matter of precaution to have the security of both vendor's lien and trust deed that should be made clear in the deed itself.

Cases which may be of interest, in connection with some of the suggestions made, have been cited in the foot-notes.

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[8]Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922); Robinson v. Payne, 58 Miss. 690 (1881).

[9]Knight v. Knight, 133 Miss. 74, 97 So. 481 (1923).

STATE BAR SECTION

REPORT OF SUB-COMMITTEE OF THE MISSISSIPPI STATE BAR ON "INTER-STATE COMPACTS FOR CRIME CONTROL"

Your Sub Committee on "Interstate Compacts for Crime Control" beg to leave report as follows:

Both members of your Sub-Committee were appointed to attend, and did attend, as delegates representing the State of Mississippi, the United States Attorney General's "Conference on Crime," held in Washington, D. C., on December 10-13th, 1934; and, among about fifty other able addesses delivered there on various subjects relating to crime, we heard the very interesting, informative, and illuminating address on "Interstate Compacts for Crime Control" made by Hon. Gordon Dean, Special Attorney of the U. S. Department of Justice, Washington, D. C., which latter address was subsequently published in the American Bar Association Journal for February, 1935, pages 89-91, to which reference is made for a fuller and more thorough discussion of this subject than can, within the proper limits for this report, be set forth herein.

We quote in part from said address, as follows:

> "When we consider the restrictive legal notions relating to state and local boundaries which have developed over a long period of years, and then combine these with a twentieth century criminal element which, in its plans and flights, is not likely to confine itself to intra-state activities, it is not difficult to understand why people so readily concede the futility of complete local control and why they so readily urge federal intervention. In other words, where local conrtol proves inadequate to meet a certain type of criminal activity we have, too readily, I think, assumed that federal control was the inevitable alternative.
>
> "This is an assumption which was certainly not made back in 1789 when the authors of the United States Constitution (by Section 10 of Article One) provided that the states might enter into compacts with the consent of Congress, and thus clearly recognized

that there were some problems at least which were beyond the power of a single state to control, but which, nevertheless, were not fundamentally matters of federal concern. An intermediate category of political control was thus contemplated—the joint action of any two or more states under an inter-state compact.

"As to the procedure for the adoption of the compacts, two methods, or systems, have been used. The states have, either through the governors, or through a Commissioner, or Commissioners, set up by resolutions, or an act, of the State Legislatures, met with similar representatives of neighboring states and worked out in detail the plan for the compact. These commissioners or agents have then either first gone back to their legislatures and had the compact enacted into law, and then gone to Congress for Congressional consent to the compact, or, they have requested Congressional consent first, and then later submitted the plan to the State Legislatures. The latter procedure was used in the case of the compact between Mississippi and Arkansas, which resulted in the passage of Chapter 141 of the Laws of Mississippi of 1910, page 132, and of the compact between Mississippi and Louisiana, which resulted in the passage of Chapter 140 of the Laws of Mississippi of 1910, page 131, which acts extended the criminal jurisdiction of the State of Mississippi to the west bank of the Mississippi River, and gave the states of Arkansas and Louisiana, respectively, *concurrent* jurisdiction with Mississippi over certain territory.

"This compact with Arkansas is discussed in detail in a case which arose under it, *State v. Cunningham,* 102 Miss. 237, 59 So. 76, Ann. Cas. 1914 D, 182 (1912).

"Until 1934, when Congress began consideration of the so-called Interstate Compact Bill, which later became law" (see Public No. 293, H. R. 7353, approved June 6, 1934) "public attention had never been focused on the possibilities of the *compact devise.* This law gave a blanket congressional consent in advance to all compacts entered into by any two or more states in the field of the 'prevention of crime and the enforcement of their respective criminal laws and policies,' etc.

"This statute did two significant things:

"First, it facilitated the procedure for the establishment and enactment of such compacts by dispensing with the time-consuming task of securing congressional consent to each separate compact.

"Second, it reminded the states that, by cooperative effort in the form of compacts, the *states themselves* could deal with many

non-local crime problems, and no concessions whatever are thus made so far as 'State rights' are concerned."

Besides, Mr. Dean well says:

"No insistence upon state rights in the crime field is convincing which does not make some mention of corresponding state duties, and in this fundamental sense this Interstate Compact Statute is a direct challenge to the states."

Among other fields in which such Interstate Compacts might profitably and effectively be utilized, attention is called to the four following important ones:

"First, the Arrest, of persons who have fled from one state to another, by pursuing officers of the first state;

"Second, the return of witnesses who have crossed state lines but who are essential to the prosecution of a criminal case in the state from which they have fled;

"Third, the establishment by two or more states of joint agencies, such as crime detection agencies, crime laboratories, or joint police units;

"Fourth, the supervision of persons in one state who have been paroled or granted probation in another state."

The proper limit for this report forbids the giving of the many reasons why Interstate Compacts, at least in the first three fields above mentioned, would result in supplying a hiatus which exists in the present laws; and in facilitating and forwarding the apprehension, arrest, and prosecution of criminals and the enforcement of the criminal laws. Nor do we deem an extended discussion of this necessary, for they are quite palpable and plain, especially to lawyers, and even to laymen, of intelligence and experience.

As to the first field above mentioned, suffice it to say that, when an officer of one state, in pursuit of a criminal, crosses a state boundary line, he has no more power to arrest and apprehend him than a mere private citizen. He acts at his own peril, and subjects himself to a civil suit for damages for an arrest made without actual knowledge that the criminal has committed a felony. Even if he makes a legal arrest, he has no legal power, or right, if the party pursued objects, to return him to the state from which he has fled.

The usual extradition proceedings (frequently long drawn out) must then be resorted to; and if the governor of the state to which the criminal has fled refuses to surrender him, as is often the case, there is no legal procedure to compel him to do so. With such a situation existing, it

is impossible for pursuing officers to cope with the criminals who usually can, and do, "get the start" on the officer and flee across state lines, especially in this day of automobiles and other rapid means of transportation.

This hiatus in the present laws can be remedied by Interstate Compacts, under which simple methods can be set up, or provided, for the arrest and return of criminals, or which would give to the officers of the demanding state the same rights and powers as the officers of the asylum state, while he is engaged in pursuing such criminals.

As to the *second* field above alluded to, as stated, in effect, by Mr. Dean, in three-fourths of the states of this nation, no legal procedure is provided by their laws which can compel a witness, no matter how necessary he may be to the prosecution of a criminal case in the state from which he has fled, to return unless he, himself, has committed an extraditable offense.

Mr. Dean further says:

> "About thirty years ago a number of the New England states enacted statutes in which, with certain reservations, they agreed to surrender those of their citizens who were wanted in other states as witnesses in criminal trials, provided the demanding state had enacted a reciprocal statute. These statutes were the forerunners of the uniform act to secure the attendance of nonresident witnesses in criminal cases, which the Commissioners on Uniform State Laws promulgated in 1931, and which has been adopted by six states since that time" (viz: Maine, Nevada, New York, North Dakota, South Dakota, and Wisconsin).
>
> "In a strict sense, a uniform reciprocal statute is not a compact, but it certainly is the equivalent of one.
>
> "The absence of such laws was in part responsible for the so-called fugitive felon law of the last Congress, which declared it a Federal crime for a person to cross state lines in order to avoid giving testimony in a *felony* case. This act, in effect, makes available Federal removal machinery in a case where interstate rendition is not available. But such a statute can only be regarded as a temporary expedient to be used until such time as the states, by compact or uniform law, shall provide for the return of witnesses who have left the trial jurisdiction."

As to the *third* field, named above, in which such Interstate Compacts could be effectively and more cheaply used, as Mr. Dean, in part, says:

"If two of the small states desire a Department of Investigation

or Detection, a Finger Print Bureau, a Scientific Crime Detection Laboratory, or even a Police Unit, is there any sound reason why each should set up such an agency, which duplicates that of the other, when both could unite in the establishment of a *joint* agency at a saving of cost which could easily serve the needs of *both* states?"

In order to have some constructive outline of procedure, something concrete, which this Committee and the Mississippi State Bar can consider and take action upon, we have secured, through the courtesy of Hon. Gordon Dean, Hon. Scott M. Loftin, President of the American Bar Association, Hon. William Shafroth, Director of the National Program of said Association, and Hon. Frank H. Patton, Attorney General of the State of New Mexico (to all of whom we desire to express our keen appreciation) copies of the following:

First—An Act Providing for the Appointment of a Commissioner to negotiate such interstate compacts as may be agreed upon, which has recently been passed by the Legislatures of the states of New Mexico, Colorado, and perhaps other states.

Second—"Uniform Act to secure the Attendance of Witnesses from without the State in Criminal Cases" which, as stated above, the Commissioners on Uniform State Laws promulgated in 1931, and which has been adopted by the six states named since that time.

We are attaching hereto, as Exhibits "A" and "B," respectively, to this report, a copy of each of said Acts; and ask that they be considered as a part thereof as fully as if copied therein.

Respectfully submitted,

D. W. HOUSTON, *Chairman*
LESTER G. FANT
Sub-Committee on Interstate Compacts for Crime Control

EXHIBIT "A" TO REPORT OF SUB-COMMITTEE ON "INTERSTATE COMPACTS FOR CRIME CONTROL"

AN ACT PROVIDING FOR THE APPOINTMENT OF THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI AS THE COMMISSIONER ON BEHALF OF THE STATE OF MISSISSIPPI TO NEGOTIATE AN AGREEMENT OR AGREEMENTS, OR A COMPACT OR COMPACTS, BETWEEN OR AMONG THE STATE OF MISSISSIPPI AND ANY OTHER STATE OR STATES, PARTICULARLY ANY OTHER STATE OR STATES ADJOINING THE STATE OF MISSISSIPPI, FOR COOPERATIVE EFFORT AND MUTUAL ASSISTANCE IN THE PREVENTION OF CRIME AND IN THE ENFORCEMENT OF THE RESPECTIVE CRIMINAL LAWS AND POLICIES OF THE STATE OF MISSISSIPPI AND OF SUCH OTHER STATE OR STATES, AND FOR THE ESTABLISHMENT OF SUCH AGENCIES, JOINT OR OTHERWISE, AS MAY BE DEEMED LAWFUL AND DESIRABLE FOR MAKING EFFECTIVE ANY SUCH AGREEMENT OR AGREEMENTS, COMPACT OR COMPACTS, AND MAKING AN APPROPRIATION FOR THE PURPOSE OF PAYING THE EXPENSES OF NEGOTIATING ANY AGREEMENT OR AGREEMENTS, COMPACT OR COMPACTS.

Be it Enacted by the Legislature of the State of Mississippi:

SECTION 1: The Congress of the United States, under and pursuant to the provisions of Section 10 of Article 1 of the Constitution of the United States, having granted its consent, by that certain act (Public No. 293, H. R. 7353), approved June 6, 1934, to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and for the establishment of such agencies, joint or otherwise, as they may deem desirable, for making effective any such agreement or agreements, compact or compacts, the practical need and utility of such an agreement or agreements, compact or compacts, between or among the State of Mississippi and any other States of the United States, and particularly between or among the State of Mississippi and those States adjoining the State of Mississippi, are hereby recognized and declared to exist.

SECTION 2: The Governor of the State of Mississippi shall appoint the Attorney General of the State of Mississippi as the Commissioner who shall represent the State of Mississippi upon any Joint Commission or Joint Commissions, representing the State of Mississippi and any other State or States, to be constituted by the State of Mississippi and any such other State or States and particularly by the State of Mississippi and any State or States adjoining it, for the purpose of negotiating and entering into any agreement or agreements, compact or compacts, with the consent of Congress heretofore granted as aforesaid, for cooperative effort and mutual

assistance in the prevention of crime and in the enforcement of the respective criminal laws and policies of the State of Mississippi and such other State or States, and for the establishment of such agencies, joint or otherwise, as they may mutually deem to be desirable for making effective such agreement or agreements, compact or compacts.

SECTION 3: The agreement or agreements, compact or compacts, so authorized to be negotiated and entered into under the provisions of this act, shall be designed to suppress crime, to circumvent the activities of criminals and to expedite their apprehension and trial, and to enforce generally the respective criminal laws and policies of the State of Mississippi and any other State or States entering thereinto, from time to time, and at any time, with the State of Mississippi, and, in order to effectuate those purposes, such agreement or agreements, compact or compacts, may contain specific provisions for the accomplishment of the following objects, or any of them, in respect to which a mutual understanding may be had, namely, (1) the arrest of any person or persons, who may have fled from any one of such compacting States into another, by any pursuing officer or officers of the compacting State from which person or persons have fled; (2) the return of any witness or witnesses, deemed essential in the prosecution of any criminal case or cases, who may have gone or fled from the compacting State in which his, her or their presence may be required into any other compacting State; (3) the establishment and maintenance by any two or more of such compacting States of facilities for the investigation of crime and the discovery of criminals such as crime detection agencies, bureaus of registration and identification, crime laboratories and like agencies; and (4) the proper supervision of any person or persons, who, having been paroled or granted probation in one of such compacting States, may have become a resident or residents of any other of such compacting States. Any agreement or agreements, compact or compacts, so authorized to be negotiated and entered into as aforesaid, shall in all respects conform with the purposes for which the consent of the Congress has been granted for its or their execution; *provided, however,* that any agreement or agreements, compact or compacts, so entered into on behalf of the State of Mississippi and any other State or States shall not be binding upon either or any of said States, or upon the respective citizens thereof, unless and until such agreement or agreements, compact or compacts, shall have been ratified and approved by the respective Legislatures of the several States entering into the same.

SECTION 4: When the Commissioner of the State of Mississippi shall be called to enter upon the performance of his duties, as provided under the terms of this Act, he shall be furnished such legal, clerical

and stenographic assistance as the Governor and he may deem advisable and necessary.

SECTION 5: The Commissioner for the State of Mississippi shall not commence the performance of his duties, or be authorized to incur any expenses for traveling, or for legal, clerical or stenographic assistance, until such time as the Governor of the State of Mississippi shall have been notified by the Governor or Governors of some other state or states that such other State or States has or have appointed a Commissioner or Commissioners for such other State or States to serve upon a Joint Commission for the purpose of negotiating and entering into any agreement or agreements, compact or compacts, authorized to be made on behalf of the State of Mississippi under the terms of this Act.

SECTION 6: The Commissioner for the State of Mississippi shall have full authority to make any and all investigations of conditions obtaining in the State of Mississippi, or in any other State or States, which may become necessary in order sufficiently to advise the Commissioner in negotiating any agreement or agreements, compact or compacts, on behalf of the State of Mississippi that is or are authorized under the terms of this Act.

SECTION 7: The Commissioner for the State of Mississippi shall receive no compensation for his services as such, but he and his assistants shall be entitled to receive their traveling and other necessary expenses incurred in the performance of his and their duties, and such expenses, together with all other necessary costs, charges and expenditures, including an equitable portion of the costs and expenses of any Joint Commission, shall be paid upon vouchers approved by the Governor, and warrants drawn for the payment thereof upon the State Treasurer by the Auditor of the State of Mississippi.

SECTION 8: In the opinion of the Legislature an emergency exists, therefore, this Act shall take effect and be in force from and after its passage.

EXHIBIT "B" TO REPORT OF COMMITTEE

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN CRIMINAL CASES

BE IT ENACTED by the Legislature of the State of Mississippi:

SECTION 1: *Summoning Witness in this State to Testify in Another State.* If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in criminal prosecutions in this state certifies under the seal of

such court that there is a criminal prosecution pending in such court, that a person being within this state is a material witness in such prosecution, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court in the county in which such person is, such judge shall fix a time and place for a hearing and shall notify the witness of such time and place.

If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution in the other state, that the witness will not be compelled to travel more than one thousand miles to reach the place of trial by the ordinary traveled route, and that the laws of the state in which the prosecution is pending and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending at a time and place specified in the summons.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary travel route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

SECTION 2: *Witness from Another State Summoned to Testify in this State.* If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions in this state, is a material witness in a prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in the criminal prosecution in this state, he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate.

SECTION 3: *Exemption from Arrest and Service of Process.* If a person comes into this state in obedience to a summons directing him to attend and testify in a criminal prosecution in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in a criminal prosecution in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

SECTION 4: *Uniformity of Interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

SECTION 5: *Short Title.* This act may be cited as "Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases."

SECTION 6: *Inconsistent Laws Repealed.* All acts or parts of acts inconsistent with this act are hereby repealed.

SECTION 7: *Time of Taking Effect.* This act shall take effect from and after its passage.

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NOTE AND COMMENT

DECISIONS OF THE UNITED STATES SUPREME COURT INVOLVING THE INTERPRETATION OF TREATIES —APPEALS FROM THE STATE COURTS

A large number of the cases which have come before the United States Supreme Court have involved questions of treaty interpretation. In determining the proper construction to be placed upon a treaty the Court has felt it necessary from time to time to assert various canons of interpretation. It is our present purpose to examine these treaty cases, with special attention to those which came before the Court on appeal from various state courts. It will be our endeavor to ascertain the general policy which the Court has followed and the principles which it has asserted and applied.

The intention or purpose of the contracting parties has been regarded by the Court as a controlling factor in its interpretation of treaties. In an early case, *United States v. Arredondo,*[1] the Court asserted that it was guided in its decision by "the apparent intention manifested in the instrument." *United States v. Texas*[2] is also a case in point. In that case the attorney general instituted a suit in equity against the state of Texas, setting forth the title and claim of the United States to a tract of land between Texas and Oklahoma designated as Greer County. Both parties claimed title to the land by reason of certain articles of the treaty between the United States and Spain of 1819.[3]

The Court, speaking through Justice Harlan, said, "Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained."[4] The Court examined the diplomatic correspondence between the United States and Spain in order to determine from the circumstances under which the treaty was made the real intent of the two contracting parties. However, only such intention as the words or acts of the parties indicate is taken into consideration by the Court. Certainly, that tribunal is not influenced by any intention, secretly cherished, which may be inconsistent with those words or acts.

There are certain difficulties which arise upon any application of an "intention rule" of construction. For example, the alleged intention of one contracting party may conflict or be inconsistent with that of the other, according to the evidence before the Court. In such a case, how will the Court construe the intention? There appears to be no uniformity in the decisions on this point. In one group of cases, in which the supreme courts of the states upheld state statutes which were alleged to be in conflict with treaty provisions, the Supreme Court upheld the treaty provisions, and perhaps liberally construed them in accordance with the

[1] 6 Pet. 691, 760, 8 L. ed. 547 (1832).
[2] 162 U. S. 1, 90, 16 Sup. Ct. 725, 40 L. ed. 867 (1896).
[3] 8 STAT. 252, 254, 256.
[4] 162 U. S. 1, 36-37, 16 Sup. Ct. 725, 40 L. ed. 867 (1896).

alleged intention of the other party. As a result it gave to the state laws a restricted interpretation, making them subordinate to the treaties. Holdings of the Court of this nature conform to the principle of international good faith on the part of the United States.

Ware v. Hylton,[5] in which Justice Patterson said that the intention of the parties must be controlling, is an example of such a case. The opinion of the Court was that the 4th article of the treaty of peace between Great Britain and the United States of September 3, 1783, nullified a contrary law of the state of Virginia in regard to the confiscation of debts of British subjects; and that these debts were revived by the treaty of peace.[6] This first case involving treaty provisions, held invalid a state law, and construed the treaty in a manner favorable to those upon whom Great Britain and the United States by their action had conferred certain rights when they signed the treaty.

Another important case in which the Supreme Court decided in favor of a policy of good faith and against a nationalistic policy was that of *Shanks v. Dupont.*[7] According to the facts, Thomas Scott, a citizen and native of South Carolina and a colonial soldier in the Revolution, died intestate in 1782, seized of certain lands in South Carolina. He left two daughters, one of whom had married, in 1781, a British officer, Shanks, and at the evacuation of Charleston in 1782, had gone with her husband to live in England, where she remained until her death some years later. Mrs. Shanks left five children who in right of their mother, and under the 9th article of the treaty between the United States and Great Britain of November 19, 1794,[8] claimed a moiety of their grandfather's estate in South Carolina. The courts of South Carolina had held that Mrs. Shanks was a citizen of South Carolina and therefore not entitled to rights vested in British subjects by the Treaty of Peace of 1783 and revived by the Jay Treaty.

The Supreme Court, however, decided that Mrs. Shanks was a British and not an American citizen and therefore was entitled to the protection of the treaty. Justice Story, taking into consideration the objectives of the Treaty of Peace with Great Britain, held that the 9th article of the Jay Treaty was intended to give rights to the heirs of Mrs. Shanks. After holding that Mrs. Shanks was to be considered a British subject,[9] he asked why the "liberal exposition" of a treaty should not be adopted, if it admitted of two interpretations, one limited and the other liberal. A

[5]Ware v. Hylton, 3 Dall. 199, 249, 1 L. ed. 568 (1796).

[6]Article IV of the Treaty of Peace of 1783 provided: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona* fide debts heretofore contracted." Quoted by the Court, Ware v. Hylton, 278, *supra,* note 5.

[7]3 Pet. 242, 268, 7 L. ed. 666 (1830).

[8]Article 9 of the Jay Treaty, 8 STAT. 116, 122, provided "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

[9]Shanks v. Dupont, 3 Pet. 242, 249, 7 L. ed. 666 (1830).

principle actually adopted by the Court was that the treaty should be interpreted in conformity with the good faith of the contracting parties.[10]

Justice Story looked to the real purpose of the parties both in the Treaty of Peace of 1783 and in the treaty of 1794. He placed a favorable construction on the rights of British subjects secured by the treaty because he thought that such was the intent of the parties; and thus he upheld a policy of good faith on the part of the United States in so far as private rights of British subjects arising under treaties were involved in cases before the Supreme Court.

Forty-nine years after *Shanks v. Dupont* was decided we find an analogous case in *Hauenstein v. Lynham*.[11] The case came up on a writ of error from the supreme court of appeals of Virginia. It appeared from the facts that a citizen of Switzerland died intestate in Richmond, Virginia, without issue and his land was sold by an escheator of that state. A relative of the deceased, a citizen and resident of Switzerland, filed a petition to recover the proceeds of the sale on the basis of certain rights guaranteed to Swiss nationals by a treaty between the United States and the Swiss Confederation of November 25, 1850.[12]

Justice Swayne, in delivering the opinion of the Court, looked to the provisions of the treaty, which did not specify the length of time that Swiss nationals would have to dispose of inherited property, but, by Article 5 provided that the heirs should be accorded such terms as the laws of the state would permit, to sell such property. The statute of Virginia did not prescribe a time limit for disposal of property of this nature, but stated that the time specified in the treaty should govern.[13] The state court admitted the right of the treaty to specify such a time limit, but since it did not do so, that court ruled against the interest of the Swiss nationals. The Supreme Court, however, examined a prior treaty

[10] *Ibid.*, 250.

[11] 100 U. S. 483, 491, 25 L. ed. 628 (1879).

[12] 11 STAT. 587, Art. V of the Treaty of November 25, 1850, provided: "The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated." Quoted by the Court, 100 U. S. 483, 486, 25 L. ed. 628 (1879).

[13] See REVISED CODE OF VIRGINIA, c. 115, § 1, and § 2. "The sixth section declares that when by a treaty between the United States and any foreign country a citizen of such country is allowed to sell real estate in Virginia, he may sell and convey within the time prescribed by the treaty; and when by such treaty citizens of the United States are allowed to inherit, hold, sell, and convey real estate situate in such country, the citizens and subjects of that country may in like manner inherit, hold, sell, and convey real estate lying in Virginia, provided that these several provisions shall apply only to real estate acquired thereafter by the citizens or subjects of such foreign country." Quoted by the Court, 100 U. S. 483, 485, 25 L. ed. 628 (1879).

with Switzerland of November 18, 1847,[14] which provided a certain time for Swiss subjects to remove inherited property from the United States and decided that it was the purpose of the later treaty that some definite time should be allowed.

The principal question was: Within what time might Swiss nationals exercise the right of disposing of inherited property. Justice Swayne found difficulty in answering this question. He held, however, that even though a period of time had elapsed, yet it was the intention of the parties, taking into consideration previous treaties, that the Swiss nationals should have the right to inherit and dispose of the property.

Although the conclusion of the Court in *Hauenstein v. Lynham* was the result of a natural and logical interpretation of the treaty provisions, Justice Swayne asserted that it was a rule of construction that treaties were to be liberally construed. By "liberal" he meant a broad construction of the Swiss treaty in favor of the Swiss nationals. The opinion here was probably not as strong an assertion of a policy of supporting treaties when in conflict with state law as was that in *Shanks v. Duponi*,[15] but it continued the precedent first set by *Ware v. Hylton*.[16] It was also asserted as a rule that when it can be shown that it was the intention or purpose of the contracting parties to grant or guarantee certain rights, these rights will be upheld.

The same question raised in the preceding cases was also raised in *Neilson v. Johnson*[17] which was recently before the Supreme Court for review from the supreme court of Iowa. In that case Justice Stone held the state law to be contrary to the treaty. He commented on the nature of treaties and state laws as follows: ". . . as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of the treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with State legislation and when so ascertained must prevail over inconsistent State enactments."[18]

These four cases indicate the general policy of the Supreme Court to uphold provisions of a treaty that are in conflict with the laws of a state. They support a broad construction of treaties and uphold a policy of international good faith in so far as the United States is concerned.

In another case, *Santovincenzo v. Egan*,[19] which concerned semi-public rights under a most favored nation treaty, the Supreme Court likewise reversed the holding of a state court and adopted an interpretation that

[14] 9 STAT. 902, Treaty of November 18, 1847, Art. KK provided "that if, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend, either by the law of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed him to dispose of such property and collect and withdraw the proceeds thereof, without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated." Quoted by the Court, 100 U. S. 483, 486, 25 L. ed. 628 (1879).

[15] 3 Pet. 242, 7 L. ed. 666 (1830).

[16] 3 Dall. 199, 1 L. ed 568 (1796).

[17] 279 U. S. 47, 49 Sup. Ct. 223, 73 L. ed. 607 (1929).

[18] *Ibid.*, 52.

[19] 284 U. S. 30, 52 Sup. Ct. 125, 76 L. ed. 151 (1931).

conformed to the standard of construing treaties in good faith. In this case the Court did not invoke the "rule" of liberal construction of treaties, but conformed to the policy of upholding the supremacy of treaties over state laws.

Following the assumption that liberality of construction means interpreting a treaty in the interest of the other contracting party it would seem, from the above five cases, that the Supreme Court will disregard state laws and render a construction that is favorable to rights of the other party if it is possible to construe the treaty in that light.

There is another group of cases in which state laws were alleged to be in conflict with treaties, but which differ from the preceding cases in that the Court did not declare the state laws invalid. Instead, it attempted to reconcile the law and the treaty, declaring that there was no conflict between the two. Is this necessarily indicative of a nationalistic policy in contrast with that of the "highest good faith"? Is there any uniform rule that the Court has, in practice, applied?

Let us examine certain representative cases in this group. In *Rocca v. Thompson,*[20] an Italian subject who had been a domiciled resident of California, died intestate, leaving a personal estate. His widow and heirs were citizens and residents of Italy. The public administrator of California was held to be entitled to issue letters of administration upon the estate in preference to Rocca, the Italian consul, who thereupon protested. The latter based his claim and appeal upon certain provisions of a treaty between the United States and Italy of 1878, chief among them being a most favored nation clause.[21] Under that clause Rocca contended that he was entitled to the privileges conferred on consuls by a treaty between the United States and Argentina of 1853.[22] The principal question before the Court was the correct interpretation of the provision in the Argentine treaty. If under that treaty the Argentine consul would have administrative powers in a similar case, then the Italian consul would have such powers.[23]

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[20]223 U. S. 317, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).

[21]20 STAT. 725, 732; see *supra,* note 20. It was also provided by Art. XVI of the Italian treaty that "In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Art. XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation." Quoted by the Court, 223 U. S. 317, 325, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).

[22]10 STAT. 1009, Art. IX of the Treaty with Argentina provided, "If citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Quoted by the Court, 223 U. S. 317, 326, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).

[23]*Cf. The Legal Position and Functions of Consuls,* Article 11, Harvard Research in International Law, 26 AM. J. INT. L. (Supp., 1932), 191, 251-302.

Justice Day, rendering the majority opinion, held that the administration of such estates comes within the province of the state law of California and that it was not the purpose of those who signed the treaty with Argentina to take this right away from the state. However, it seems a fair implication that if the Argentine treaty on its face had clearly extended this right to consuls, the Supreme Court would have upheld Rocca's contention. Since the treaty provision was not clear on this point the Court upheld the states' rights view.

There are several points worthy of note in this case: First, the Court held that in this country the right to administer property left by a foreign subject within the jurisdiction of a state was primarily committed to state law. Yet it did not thereby infer that this was a limitation on the treaty-making power. Second, the Court could see no evidence of intention on the part of the United States, to give original administration of an estate of this nature to a foreign consul to the exclusion of those authorized by the local law of California. This was the basis of the decision. Third, the Court entirely disregarded the "so-called rule" of liberal construction. It might have been a difficult task to apply it here, but the Court did not even make the attempt. In other words, the Court's attitude toward the liberality "rule" was that treaties "are to be read in the light of the conditions and circumstances existing at the time that the treaty is entered into," an assertion which it attempted to prove.

Finally, the Court reached its conclusion from extraneous evidence.[24] Thus, the holding was that, under the most favored nation clause, the provisions of the Argentine treaty could be applied for the benefit of the Italian government; but there was no evidence or purpose in the Argentine treaty to take away from the states, rights of local administration provided by their laws "upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property."[25]

As difficult as it may be for one to agree with *Rocca v. Thompson,* it seems to stand out as a holding in favor of a nationalistic policy; that is, certain rights are inherent in states and unless the treaty expressly overrides those state rights the Supreme Court will uphold them and disregard the treaty. It was a case of "liberal" construction not for the benefit of the other party but for the states.

Of the other cases in which the Supreme Court upheld a state law which apparently conflicted with a treaty, the following may be mentioned: *Peterson v. Iowa,*[26] in which the holding of the Court hinged on the fact that the property involved was left by an American citizen and was located in and was subject to the jurisdiction of the state of Iowa; *Ohio ex rel. Clarke v. Deckelbach,*[27] in which a city ordinance was upheld; and *Terrace v. Thompson,*[28] in which the Court upheld a Washington statute by adopt-

[24]223 U. S. 317-331-332, 32 Sup. Ct. 207, 56 L. ed. 453 (1912).
[25]*Ibid.,* 334.
[26]245 U. S. 170, 178, 38 Sup. Ct. 95, 62 L. ed. 225 (1917).
[27]274 U. S. 392, 47 Sup. Ct. 630, 71 L. ed. 1115 (1927).
[28]263 U. S. 197, 224, 44 Sup. Ct. 15, 68 L. ed. 255 (1923). *Cf.* Porterfield v. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. ed. 278 (1923).

ing a narrow construction of a treaty. In the last mentioned case the Supreme Court affirmed the ruling of the district court. Justice Butler, delivering the opinion, reasoned that agriculture was not a "trade" within the meaning of the treaty of commerce and navigation between the United States and Japan. Consequently, unless the right to own or lease land was given by the treaty, there could be no conflict between the treaty and the statute.

In arriving at this conclusion the Court examined the circumstances under which the treaty was signed, and also the later diplomatic correspondence between the two governments.[29] This latter evidence was a controlling factor in the decision. Thus, Justice Butler examined the correspondence between Secretary of State Bryan and Viscount Chinda in order to show, "that, in accordance with the desire of Japan, the right to own land was not conferred. And it appears that the right to lease land for other than residential and commercial purposes was deliberately withheld by substituting" certain phrases. This decision may have been in accord with the intention of the parties as it appeared from the "preparatory" work, but it did not represent a broad construction of the treaty provisions themselves.

All of the cases in this group succeeded in reconciling state laws with treaties with which they were alleged to be in conflict. If a principle may be formulated from them it would seem to be that the Supreme Court will uphold decisions of state courts when there is an apparent conflict between a treaty and a state law if the state statute follows a generally accepted public policy and the treaty provisions do not directly conflict with the state law. The Court will not usually construe a treaty so as to invalidate rights clearly reserved to the states. It should be added, however, that there are certain cases in which it would seem that the Court has followed a different rule.

It should not be inferred from the above cases that the state courts do not, on occasion, reconcile state statutes with treaty provisions with which they are in apparent conflict. In the case of *Jordan v. Tashiro*[30] the state supreme court of California decided in favor of the treaty provision and refused to uphold certain actions of state officials. It appeared from the facts that some Japanese subjects in California desired to form a corporation for the purpose of constructing and operating a hospital in Los Angeles. This privilege was denied them by certain state officials who claimed to be acting in accordance with the alien land law of California. The Japanese citizens relied upon the treaty of commerce and navigation

[29]See 263 U. S. 197, 223-224, 44 Sup. Ct. 15, 68 L. ed. 255 (1923).

[30]278 U. S. 123, 130, 49 Sup. Ct. 47, 73 L. ed. 214 (1928). See Tashiro v. Jordan, 201 Cal. 236, 247 (1927). The Supreme Court of California held that "in the enactment of the Alien Land Law the State of California has not attempted to run counter to the Treaty of 1911, or to any other treaty between this country and a foreign country. On the other hand, the provisions thereof relative to the right of aliens ineligible to citizenship to acquire and possess real property in this state expressly recognize such acquisition and possession in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject."

between the United States and Japan of 1911 in support of their claim.[31] The principal question before the Court was whether the treaty could be so interpreted as to permit the Japanese to form the corporation. The supreme court of California decided in favor of the Japanese subjects, which decision was affirmed by the United States Supreme Court.

In *Todok v. Union State Bank of Harvard, Nebraska,*[32] we have the unique situation of the state supreme court upholding a treaty over an apparently conflicting state law, but the Supreme Court reversing the holding of the lower court and thus upholding the state law.

The facts in the *Todok* case were as follows: Knudson, a native and citizen of Norway, settled in Nebraska in 1878. He established a homestead and resided there until his death in 1929. He died intestate; however, a few months before his death he executed deeds of his homestead to his nieces and their husbands. They in turn deeded the property to the Union State Bank. By Nebraska law the signature of Knudson's wife was necessary to make his deed of the property valid.[33] Since this signature was lacking, Knudson's son, a native and citizen of Norway, brought suit contesting the deeds of conveyance. The supreme court of Nebraska held that the deeds were valid, and therefore that the title had not descended to the wife and son, for under the treaty with Norway, Knudson was entitled to convey the property. Thus, the court applied the treaty provisions instead of the state law, holding the latter to be inapplicable.[34]

The Supreme Court took up the interpretation of the treaty as the principal question. It held, contrary to the decision of the state court, that the treaty provisions were inapplicable in this case and that the law of Nebraska by its very nature should be upheld, relating, as it did, to the conveyance of homesteads, and applying equally to American and Norwegian citizens.[35]

Thus, although the Supreme Court accepted the treaty as law, it found no "ground for the conclusion that in establishing this reasonable policy Nebraska took any action which was inconsistent with the provi-

[31]37 STAT. 1504. The Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan, proclaimed April 5, 1911, provided that "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, . . . " etc.

[32]281 U. S. 449, 456, 50 Sup. Ct. 363, 74 L. ed. 956 (1930).

[33]§§ 2819 and 2832, COMP. STAT., 1922.

[34]See *supra,* note 32.

[35]Treaty of Amity and Commerce with Sweden, April 3, 1783, 8 STAT. 60, 64, revived with Sweden and Norway, September 4, 1816, 8 STAT. 232, 240; replaced by treaty with Sweden and Norway, July 4, 1827, 8 STAT. 346, 354; now in force with Norway, Sen. Doc., 61st Cong., 2nd Sess., No. 357, vol. 48 (2 Malloy), 1300. Art. 6 provided that "The subjects of the contracting parties in the respective States, may freely dispose of their goods and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction'* on the part of the government of the two States respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against immigrations, or

sions of the treaty." This holding of the Court supported a state law and reconciled it with an existing treaty, although the state court had ruled that the provisions of the state law were inapplicable because in conflict with the treaty. In other words, in deference to an accepted policy of nearly all states with respect to homesteads the Supreme Court reversed the decision of the Nebraska court. This is the only case found in which the Supreme Court reversed a state court which had upheld treaty provisions that apparently conflicted with state laws.

The Supreme Court has no settled rule for the construction of treaties whose provisions are alleged to be in conflict with state laws or policies. The Court may attempt under certain circumstances to reconcile a state law with a treaty, but if a right generally reserved to the states alone is in question it will not apply the treaty provisions unless the purpose of the treaty is clearly contrary to the state law.[36] In the latter case the Court will construe broadly the treaty in so far as the other contracting party is concerned.[37] But where a general public policy apparently conflicts with the treaty the Court will, if possible, reconcile the two and thus restrict the provisions of the treaty in order to permit the application of the state law.

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which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any one of them, shall be at liberty to make respecting this matter, such laws as they think proper." Quoted by the Court, 281 U. S. 449, 453, 50 Sup. Ct. 363, 74 L. ed. 956 (1930).

The holding in this case hung on the interpretation to be given to the terms "goods and effects" found in the above treaty provision. Did it include the property here in question?

[36]*Cf.* Rocca v. Thompson, *supra,* note 20.

[37]Ware v. Hylton, *supra,* note 5; Shanks v. Dupont, *supra,* note 7; and other similar cases.

EVIDENCE—ADMISSIBILITY OF DYING DECLARATIONS—MISCONDUCT OF AUDIENCE DURING TRIAL—AFFIRMANCE BY EVENLY DIVIDED COURT

The defendant, an unmarried woman, was indicted and convicted of the murder of Dr. Preston Kennedy by mercurial poisoning. Both defendant and deceased were physicians. The poison was alleged to have been given, in a drink of whiskey, on the early morning of July 28, 1933. The corpus delicti was established by a dying declaration of the deceased, made August 2, 1933, in which he stated, among other things: "Dr. Dean gave me a drink of whiskey with poison in it." His death occured August 6, 1933. Three assignments of error were discussed by the court, which affirmed the conviction[1] by an evenly divided court.[2] They were: (1) that the verdict was contrary to the great weight of the evidence;

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[1]Sarah Ruth Dean v. State, ... Miss. ....., ... So. ..... (1935). A suggestion of error has been filed in this case, but at the date of writing has not been decided by the court.

[2]CONSTITUTION OF MISSISSIPPI, 1890, § 286, provides for a Supreme Court consisting of six members, the court usually sitting in two divisions. Where a judge dissents, the case is decided by the entire court; a majority of the court is necessary to reverse the judgment of the lower court.

(2) that the trial court erred in admitting the dying declaration; and (3) that the trial court erred in refusing to grant a new trial on the ground of improper conduct of the audience in the court room during the progress of the trial.

1. In support of the contention that the verdict was contrary to the great weight of the evidence, the defendant urged that no motive for the crime was proved by the state. The evidence showed, without dispute, that for several years a mutual and ardent affection had existed between defendant and deceased; that their relationship led to a divorce of the deceased by his wife. On the night the poison was alleged to have been given, the defendant and Dr. Kennedy were in the former's office drinking. Dr. Dean sent Dr. Kennedy for water; on his return the drinks were poured. Dr. Kennedy (as he stated a few days later) detected a metallic taste in his drink; he soon left and later became ill. For five days he treated himself for ptomaine or alcoholic poisoning, having made the dying declaration on the fifth day. In answer to the prosecution's question asked her on cross-examination, Dr. Dean stated that she did not inquire concerning the deceased's condition during those five days, because she supposed that he had merely gone on a spree. Up until a week before the drink was taken, the deceased had written the defendant many letters expressing his love for her. The theory of the state was that the deceased disclosed to Dr. Dean his intention of remarrying his former wife; that the defendant, rather than lose him, determined to kill him.

In discussing the defendant's failure to inquire about the deceased, the court held that her "explanation did not explain." It was stated: "Subconsciously, therefore, the defendant, in answering that she supposed that the deceased had gone on a spree, really answered that she was aware that he had taken one last drink from which he would never recover." The court, in holding that a motive for the crime was sufficiently disclosed by the evidence, stated that unless it were in fact the truth that the defendant was guilty, the deceased would never, in his dying declaration, have branded her as a murderess. Thus the court reached the conclusion that the issues were for the jury to decide, and that the verdict was not contrary to the weight of the evidence.

In the dissenting opinion, written by Justice Etheridge, these conclusions were sharply criticised. It was pointed out that the accusatory part of the dying declaration was contradicted by former statements of the deceased that he had eaten a "pig sandwich" and drunk some whiskey. The evidence showed that only one millionth grain of mercury was found in his system. Several doctors testified that this amount could not be fatal, that a surgeon, as the deceased was, would absorb this amount in washing his hands regularly in a solution of bichloride of mercury. The evidence shows that the deceased had subnormal temperatures, while a high fever ordinarily accompanies mercurial poisoning. It is believed that this evidence was insufficient, even including the dying declarations, to sustain a conviction. In every criminal case, the defendant is presumed to be innocent, and he carries this presumption with him all through the trial until the state has by evidence, proved him guilty beyond a reasonable doubt; a mere preponderance of evidence in favor of the state is

insufficient to convict.[3] The court, in upholding the conviction on the evidence here presented, seems to disregard the presumption of innocence and to indulge in a presumption of guilt drawn from a lack of evidence, or negative evidence, in order to aid evidence produced by the state, to support a conviction. Negative evidence, when contradicted by positive evidence of other witnesses, is entitled to but slight weight.[4] The fact that Dr. Dean did not satisfactorily explain her failure to inquire for the deceased, in view of these rules, certainly would not warrant the assumption that her explanation was a tacit admission of guilt. The deceased waited five days after taking the drink, during which time he treated himself for ptomaine or alcoholic poisoning, before he stated he was poisoned from mercury. These facts, it is submitted, were sufficient to raise a reasonable doubt as to defendant's guilt in the mind of any juror not swayed by prejudice or passion against the defendant.

2. The evidence would clearly have been insufficient to convict had the dying declaration been excluded. The majority opinion held that the accusatory part of it was admissible; that other parts of it were inadmissible but harmless error. Dying declarations are a species of hearsay evidence, admitted from necesssity only in homicide cases because it is presumed that a person about to face his Maker will not do so with a lie on his lips.[5] The Mississippi Supreme Court has prescribed very definite rules as to their admissibility. (a) They must be made under the realization and solemn sense of impending death. (b) They must be utterances of a sane mind. (c) They are restricted to the act of killing and circumstances immediately attending it and forming a part of the res gestae. (d) No declaration, or any part of it, is admissible unless competent and relevant if made by a living witness. (e) Great caution should be observed in the admission of such testimony, and the rules which restrict it be carefully guarded.[6] Such declarations are admissible only as to the circumstances of the killing, and are restricted to a statement of facts; opinions and inferences are to be excluded.[7] The sense of impending death of the declarant at the time of making the statement must be such that he believed he was on the verge of immediate dissolution; a mere belief that he will not recover or that he will ultimately die, is insufficient.[8]

In the present case the trial court admitted not only that part of Dr. Kennedy's statement that the defendant had poisoned him, but also the entire conversations with members of his family. The conversations between the deceased and his mother as to whether he had been a good and a brave son; between the deceased and his brothers that they were "the three musketeers" and nothing should prevent them from meeting in heaven; that he wanted his brothers to take care of his former wife and

[3]1 JONES, COMMENTARIES ON EVIDENCE (2nd. Ed.) § 45; Blalock v. State, 79 Miss. 517, 31 So. 105 (1901); Gentry v. State, 108 Miss. 505, 66 So. 982 (1914).

[4]1 JONES, COMMENTARIES ON EVIDENCE (2nd ed.) §§ 601 and 20.

[5]Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897).

[6]Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897).

[7]Payne v. State, 61 Miss. 161 (1883).

[8]Bell v. State, 72 Miss. 507, 17 So. 232 (1895); McDaniel v. State, 8 S. & M. (Miss.) 401, 47 Am. Dec. 93 (1847); Lewis v. State, 9 S. & M. (Miss.) 115 (1847); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897); Merrill v. State, 58 Miss. 65 (1880).

child; that he told his mother he was "safe in the arms of Jesus"; all these statements were admitted over objection of the defendant. The prevailing opinion held that these statements were inadmissible, but that their admission was not error prejudicial to the defendant. In the dissenting opinion of Justice Etheridge, the following statement is made: "It is difficult for me to see what possible collateral matter could be more prejudicial than statements of this kind. It was the enactment, in the court room, of a death bed scene, well calculated to stir the passions and emotions of the jury and the spectators, and to create a violent antipathy and hostility toward the defendant." That such evidence, admitted by the entire court to have been incompetent, did prejudice the jury against the defendant is shown by the attitude of the audience in cheering when the state scored a point and hissing when the defense scored. (Affidavits as to such conduct were not denied by the state). If such was the effect on the audience, it is reasonable to suppose that there was a similar effect upon the jury.

The defense challenged the mental competency of the deceased at the time of making the dying declaration. The prevailing opinion held that when this is done, it is permissible to admit other portions of the statement tending to prove the sanity of the declarant. Consequently it was held not to be error to admit those statements of the deceased concerning his insurance, his debts, etc. But such facts go to the admissibility of the dying declaration, and as such are preliminary questions of fact to be decided by the trial judge before passing on the admissibility of the evidence. Whether the declarant was mentally competent is a question for the judge to decide, not for the jury to pass on.[9]

Another argument, strongly pressed by the defendant, was that the deceased was not under a sense of impending death when he made the statement. He had expressed the hope that he might live until his former wife could arrive from the Canal Zone, Panama, and had asked a doctor to pray for him that he might live at that time. The majority opinion states that the declarant "must according to his settled and hopeless expectation [of death] feel that his death is then imminent or impending, and that it will speedily come." But the court also says that since the deceased was a physician and knew he might lapse into a coma, it was "not necessary that his expectation should then have been of immediate death, but it was sufficient, as amply shown, that he entertained a settled and hopeless expectation of death, and that it was certain and impending, and that it might come at once or in a very few days." Such a holding hardly seems to bear out the following statement of the court that it does not intend to relax the rule that the declarant must be face to face with death. In the dissenting opinion Justice Etheridge said: "The declarant did not, so far as the proof shows, know that he was in the face or jaws of death at the time he made the alleged declaration, but, at most, he thought he would ultimately die." In one case decided by the court,[10] involving this point, the declarant said: "I know I will die in a very few days; for I cannot live this way. Ed Bell has killed me; I know it." The court here held that the declaration was inadmissible because there

[9]Owens v. State, 59 Miss. 547 (1882); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897); Guest v. State, 96 Miss. 871, 52 So. 211 (1910).

[10]Bell v. State, 72 Miss. 507, 17 So. 232 (1895).

was no sense of impending death in the declarant. As stated in the dissenting opinion of the instant case, it is difficult to understand how this declaration could have been admitted while that one was excluded.

Another objection may be raised to this dying declaration, and that is that it is at most the expression of the declarant's inferences and conclusions, and not the statement of a fact. The test of whether a declaration is a statement of opinion, or a fact, is whether it is the direct result of observation through the declarant's senses or comes from a source of reasoning from collateral facts; if the former, it is admissible; if the latter, it is inadmissible.[11] In one case it was held that a dying declaration, that the defendent had poisoned the deceased with a capsule, was not the statement of an opinion.[12] In that case, however, the deceased knew that the defendant had procured the capsule at a drug store, for the treatment of the deceased, and that he had taken the capsule given him. In this case, when the whole of the declaration ("Dr. Dean gave me a drink of whiskey with poison in it; *I think it was mercury.*[13]) is considered, it is apparent that such was his belief and opinion, coming from a source of reasoning from collateral facts. The fact that the deceased treated himself for other illness during a period of five days indicated that he did not *know* the drink of whiskey contained poison.

3. The third assignment of error was the alleged improper conduct of the audience during the trial. This conduct consisted in cheering when the state won a point, and in hissing when things were done in behalf of the defendant. The trial judge, when such demonstrations occurred, rapped for order and reprimanded the audience; but he did not admonish the jury to disregard the occurences. The defense first raised this point in its motion for a new trial. The Supreme Court held that it is the duty of the trial judge, when these things happen, to restore order, reprimand the audience, and in addition, to admonish the jury, speaking to them directly, not to consider the demonstrations. But it is necessary, in order to avail of this fact for a new trial or a mistrial, that the party aggrieved thereby raise the objection at the time the misconduct occurs, before verdict. The court said that unless this is done, it must be presumed that the demonstrations were not such as to prejudice the rights of the party objecting. Two exceptions to this rule were mentioned, though not expressly decided, by the court. The first is where the unfriendly demonstration is so pronounced that the judge could not fail to notice it, and he either does nothing or else reprimands offenders in such feeble manner as to be the equivalent of doing nothing. The second is where the demonstration is so hostile as to make it dangerous for the party or his counsel to object. In either of these two cases, the objection may be raised for the first time after verdict and in a motion for a new trial. The court held that neither of the exceptions was applicable to the case here.

4. Finally, it might be observed that, whether the decision of the court here be considered right or wrong, it is undersirable for a conviction to be sustained by an evenly divided court. The theory upon which the

[11]House v. State, 94 Miss. 107, 48 So. 3, 21 L. R. A. (N. S.) 810 (1908); Payne v. State, 61 Miss. 161 (1883).

[12]Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1897).

[13]The portion in italics was excluded by the trial court.

judgement of a lower court is automatically affirmed by an evenly divided court is that a majority of the court is required to reverse a lower court. With six judges constituting our Supreme Court,[14] it is, of course, to be expected that often the court will be evenly divided. It is submitted that our Constitution should be amended so as to authorize the Supreme Court, when it is evenly divided, in capital cases at least, to appoint as a special judge some circuit judge, chancellor, or member of the state bar, to sit and participate in the determination of the case. It is believed that this, or some other similar procedure, would be far more desirable than the affirmance of a conviction and sentence by a court evenly divided.

JAMES S. EATON

[14]CONSTITUTION OF MISSISSIPPI, 1890, § 286.

BRIEF HISTORICAL CONSIDERATIONS OF THE MISSISSIPPI TERRITORY PRIOR TO THE CONSTITUTION OF 1817*

Before reviewing and analyzing, to some extent, the Mississippi Constitution of 1817, it is perhaps fitting to give a brief historical retrospect of the period beginning in 1800 and culminating in the admission of Mississippi as a State in 1817. In 1800, two years after the United States had received the Mississippi Territory from Spanish dominion, the census showed a population of 8,850. Came 1810 and the population had jumped to 40,352. Quadrupling its total number of inhabitants in ten years, such a substantial increase is little short of remarkable when one considers the numerous obstacles impeding the westward march of civilization in early nineteenth century America. By 1816 the population of the Territory had been enlarged by nine times the number which inhabited the same area when the United States received it from Spain. Of the 75,512 inhabitants, however, 30,061 were negro slaves and 356 were free people of color.

Principally, there were four regions of population. The Natchez district in the southwestern corner of the Territory was the leading industrial center; for, in the earlier days of the Territory there was only one other settled area, this being the region of the Alabama and Tombigbee rivers. With the addition of new lands in 1804 came a new settlement located to the north along the Tennessee river. Spain's relinquishment of West Florida added the coastal region, including Biloxi, as a fourth populated area. These four distinct populated areas were located distantly apart and beaten trails offered the only source of communication between them. The Natchez district was served by the Mississippi river as its main outlet and inlet of all travelling and shipping. Drifting flatboats carried slowly along by the muddy current carried the bulk of freight and passenger service. Toward the close of the territorial period some steamboats

*This comment is a precis of the first chapter of a thesis entitled "A Constitutional History of Mississippi" submitted to and approved by Dr. Edward S. Corwin, Chairman of the Department of Political Science of Princeton University. The thesis itself was prepared by the author in meeting the requirements for his Bachelor's degree received from Princeton in June, 1934. If plans materialize, it is hoped that the succeeding six chapters of this thesis can be published in the MISSISSIPPI LAW JOURNAL during the coming academic year of 1935-36. The present instalment is merely introductory and serves only to provide a general background for later observations and deductions more analytical in nature.

were in use along the banks of the river around Natchez, but for the most part, these were not utilized commercially to any great extent until after Mississippi had become a state.

Being essentially an agricultural area, the Territory enjoyed scarcely any manufacturing interests of importance. New England and Europe offered manufactured articles and especially New England after Spain reluctantly relinquished her lucrative colonial trade. After 1795, however, when an improved cotton gin was made by a negro for Mr. Daniel Clark of Wilkinson County, the growing of cotton assumed an added importance in the economic life of the Territory. Gins of this improved type were soon scattered throughout the Territory thus giving cotton production that added impetus which established it as the principal means of livelihood for practically all planters on the increasingly larger plantations of the Mississippi Territory.

Educationally, the Territory was poor. Comparatively few were sent to school and for them an education lay at the end of a journey over the slow and uncomfortable water route to New Orleans and up the Atlantic Seaboard or over rough, uncertain inland trails. Education, in the main, therefore, was to be had in the home. In some instances, tutors were procured for boys, but generally learning consisted chiefly of the more rudimentary elements explained in simple style by the household elders to the best of their ability. The plight of the Biloxi region offered the most outstanding example of the Territory's educational needs. Out of a total number of approximately eight hundred people, only one or two could read or write. Such a condition, however, was not altogether true of the whole Territory. Education in the Natchez district was more general and in the early days of the Territory plans were laid to encourage and promote educational facilities. Culminating these plans, the territorial legislature in 1802 passed an act creating Jefferson College. In addition to this, there were one or two other academies in the Territory and one of the first was founded in 1801 by Dr. David Key for the education of girls.

Presenting briefly an admittedly incomplete picture of the Mississippi Territory, only a few indispensable aspects have been given—only those features of the life and living of the people which they necessarily and naturally breathed into their first constitution. The equipment available to the first Constitutional Convention and the ability of its members as well as the composition will be suggested in succeeding pages. For the period then from 1800-1816 suffice it to say that Mississippi made rapid progress in many ways. Economically, she became singularly identified with cotton production. Plantations were improved and enlarged and dependency upon slave labor increased. Transportation methods were steadily improved. In 1812, the "New Orleans" made weekly trips between Natchez and New Orleans and in 1815 the "Enterprise" offered regular passenger service between the two ports. The press in Mississippi had an early beginning and made rapid progress over a short period of time. Facilities for education, though scarce at first, were soon supplied; schools and academies soon sprang up throughout the Natchez district and gradually they became established in other parts of the Territory. Early Mississippi history is, in large part, essentially composed of a history

of the Natchez district and the first Constitutional Convention was one made up chiefly by men residing in that portion of the Territory.

By virtue of the rapid progress of the Territory in general and more especially because of the great increase in population as indicated by the census of 1810 many believed that Mississippi should become a state upon an equal footing with the other states. As early as 1811 voices from various sections were heard advocating statehood, and some, notably George Poindexter, had advocated extending state status to the entire Mississippi Territory. Others, however, felt that the entire area was too large and too thinly populated in the eastern portions and the suggestion was made that the Territory be divided, allowing the western portion to become a state immediately but continuing territorial form of government in the more sparsely settled eastern part. At the session of the Fourteenth Congress in December, 1815, a petition of the Legislature for the erection of the whole Territory into a state was referred to a committee headed by William Lattimore, who had been most active in such movements. A similar bill was debated the following March, and the Senate finally agreed that before definite action be considered a census of the Territory be taken. To balance the ever sharpening division of power in the national congress, the Senate also ordered a census of Indiana which was with Mississippi concurrently applying for admission.[1] "In the following December, Mr. Lattimore reported that the Mississippi Territory contained 75,512 souls, of whom 45,085 were free white people, 356 free people of color, and 30,061 slaves. Because of the 'unprecedented magnitude' of the country proposed to be admitted as a state and the great distances between its principal settlements, Mr. Lattimore's committee proposed a division of the Territory by north and south line—the admission of the western part as a State and the continuance of a territorial government for the eastern portion. Numerous petitions from Mississippi conventions continued to be received suggesting various lines of division, or none whatever, and finally, the senate committee reported two bills, as Lattimore had done in the house, providing for a western State and an eastern territory. They passed the upper house in January, and the lower in February, 1817. This action was hastened by the southern members of congress, as the enabling bill for Indiana had passed in the preceding December. The enabling act for the State of Mississippi and the Alabama Territory was signed by President Madison on the first of March, 1817." Even as early as 1817 the political and economic dawn of the irrepressible conflict began to make itself clear. States had already become sharply defined and the contest for the balance of power is well illustrated by the attitude of the southern members of congress in hastening the admission of Mississippi, a slave state, to balance the admission of Indiana which was admitted a free state.

In creating a state from the Mississippi Territory, three definite steps were necessary and of these the Enabling Act was the first. The second was the calling of a constitutional convention in pursuance of the provisions of the Enabling Act of congress and the third was the acceptance of the proposed constitution by both houses of congress.[2] "The boundaries

[1] ROWLAND, MISSISSIPPI, THE HEART OF THE SOUTH, 472.
[2] *Ibid.*, 482.

of the proposed State were thus defined: Beginning on the River Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same, thence east along the said boundary line to the Tennessee River, thence up the same to the mouth of Bear Creek; thence by a direct line to the northwest corner of the County of Washington; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues off the shore, to the most eastern junction of Pearl River with Lake Borgne; thence up said river to the thirty-first degree of north latitude, thence west along said degree of latitude to the Mississippi River, thence up the same to the beginning."

In preparing for the forthcoming constitutional convention, certain definite and somewhat exacting legal qualifications were required of delegates to the convention. To be a delegate properly qualified, one must be a free white male citizen at least twenty-one years of age with a residence of at least one year in the Mississippi prior to the election of delegates. All the county requirements imposed upon any qualified voter in electing representatives to the General Assembly were required of delegates to the convention. Fourteen counties were entitled to representation: Warren, with an allotment of two delegates; Claiborne, four; Jefferson, four; Adams, eight; Franklin, two; Wilkinson, six; Amite, six; Pike, three; Lawrence, two; Marion, two; Hancock, two; Wayne, two; Greene, two; and Jackson, two. The village of Washington in Adams County was designated as the place of meeting and the first Monday of July was mentioned as the opening day of the convention.

The Constitutional Convention assembled on the appointed day, July 7, 1817, with David Holmes, Governor of Mississippi Territory at that time, presiding. The assemblage was not one composed of frontiersmen and unlearned men; nor was it nondescript in any sense. On the contrary, the delegates were polished and learned; they saw clearly the task before them nor were they unfamiliar with the proper procedure necessary to be followed, if the constitution was to be of lasting success. Delegates, for the most part, were natives of either Virginia or Pennsylvania. Yet some had removed from South Carolina and Georgia to the territory, and it is interesting to note that of all the delegates only one was a native Mississippian, namely, Gerard C. Brandon of Wilkinson County.

Of the delegates present at the convention, perhaps the foremost was David Holmes, a native of Pennsylvania who had removed to Virginia at the age of ten where his family was very prominent. Having the then somewhat singular advantage of a college education, and as a reward of his success in Virginia, President Madison appointed Mr. Holmes Governor of the Mississippi Territory in 1809. Upon his assumption of territorial duties, many of Holmes' friends removed with him from Virginia to Mississippi. Although not a man of preeminent ability, Mr. Holmes possessed an enduring faculty for hard work and strenuous plodding and he presided over the convention with dignity, tact, and ability.

Foremost among those who were outstanding in drawing up Mississippi's first organic law was George Poindexter, a delegate from Wilkinson County. Admittedly, the master-mind and leader of the convention, as well as being one of the foremost intellectuals of his time, he was the son of an eminent Virginia Baptist preacher and came to the Territory as

a young lawyer in 1802, locating at Woodville, in Wilkinson County. Poindexter represented the Territory in Congress for six years, but resigned to accept a seat on the Supreme Court bench of Mississippi. Upon being elected a delegate to the constitutional convention of 1817, he was appointed Chairman of the committee to submit a draft of the proposed constitution, and the constitution as it finally appeared, was mainly the work of Judge Poindexter. In speaking of him Dr. Dunbar Rowland says, "Judge Poindexter attained the highest honors in the executive, legislative, and judicial departments of the State Government, and few Mississippians have been so signally honored."[3]

Equally influential in the construction of the first Mississippi Constitution was Dr. William Lattimore, a delegate from Amite County. Like Poindexter, Dr. Lattimore was a native of Virginia coming from the region around Norfolk. Settling in Natchez in 1801, during the "boom period" of the territory, he became eminent in the practice of medicine. Lattimore was a man of sense and cultivation. He spoke fluently and forcibly and in private life he was greatly beloved. Settling later in that part of Wilkinson County which subsequently became the county of Amite, Dr. Lattimore was elected to Congress in 1905, and reelected a second time, when he was succeeded by George Poindexter, who, after serving four years, declined reelection. At this time Dr. Lattimore was again elected and served until Mississippi became a State in 1817. Claiborne says of him that he was one of the purest of our public men.[4] "And in private life, of all our public men, he had ever been the most exemplary and unimpeachable.[5] Dr. Lattimore's last public act was in locating the State Capitol, Jackson, in 1822 with the aid of Thomas Hinds and Judge Peter Van Dorn.

Walter Leak, representing Claiborne County, was a careful and industrious lawyer. The federal government had sent him from his native home of Virginia to Mississippi as a judge of the Territorial Supreme Court. After Mississippi became a state Judge Leake was the first Senator to be elected to the United States Senate. His desire for work labelled him as one of the most sincere and hardest working members of the convention.

John Taylor of Natchez had none of the advantages of high birth, wealth, or education. He was born in Pennsylvania of poor parents and early began the study of law. With the aid of friendly lawyers he was admitted to the Bar, but removed to Natchez in 1805 where he practiced his profession with eminent success, later becoming the first Supreme Court Chief Justice of the State of Mississippi. Josiah Simpson was also a delegate from Adams County. He was one of the truly great lawyers and jurists of his day. Born in Pennsylvania and graduating from Princeton at an early age, Simpson came to Mississippi in 1812 as one of Madison's appointees to the Supreme Court of the Mississippi Territory. James C. Wilkins, a native of Pennsylvania, was a third delegate from Adams. Mr. Wilkins at that time was the richest merchant in the whole Territory and represented the business interests at the convention.

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[3]Rowland, *Mississippi's First Constitution and its Makers*, 6 MISSISSIPPI HISTORICAL SOCIETY 84.

[4]CLAIBORNE, MISSISSIPPI HISTORY, 262-263.

[5]*Ibid.*, 299.

The list of illustrious men assembled at Washington on July 7, 1817, is long and their names are perpetuated in the history of the State. Besides those already mentioned, Pennsylvania furnished two other outstanding members of the convention. Christopher Rankin of Adams County, and Joshua Clark of Claiborne, were both able delegates who originally came from Pennsylvania and who later contributed heavily to the political history of Mississippi. Virginia gave the largest number of native sons, for in addition to those mentioned in preceding paragraphs many others stood forth among the list of the leaders. Louis Winston the brilliant secretary of the convention, Cowles Mead, the devoted follower of Jefferson, and Edward Turner, who supplied much of the technical legal knowledge and thought to the convention were all native Virginians. John Joor originally of South Carolina, Harmon Runnels originally of Georgia, and Dougal McLaughlin of North Carolina were among other outstanding members which other States claimed as native sons. If, then, from this group of brilliant men only a few are mentioned, it is hoped that none will consider it unjust discrimination or lack of appreciation of the work done by all. There are many others whose work was true and lasting and it is upon the effort, character, and vision of this entire group of eminent men that Mississippi rested its first foundations as a State.

Little more than a month was required by the convention in evolving Mississippi's first organic law. The convention assembled on July 7th, 1817, and adjourned on August 15th of the same year. The work of adopting a plan of government was placed largely in the hands of one committee. After resolving itself into a committee of the whole, the convention passed the following resolution: "*Resolved.* That a committee of twenty members be appointed to prepare and report to this Convention, a Constitution or form of government for the State to be formed in the western part of the Mississippi Territory."[6] The day following the adoption of this resolution another was passed which added one more member to the committee thereby bringing the total membership to twenty-one. George Poindexter was appointed chairman and he was ably assisted by Messrs. Simpson, Leake, Shaw, Rankin, Wilkins, Downs, West, Lattimore, Hanna, Minton, Runnels, Ford, Mead, Jourdan, Burnet, of Claiborne, Patton, McKay, Bilbo, Brandon, and McNabb. A Rules Committee was also appointed for the purpose of drawing up the standing orders and resolutions for conducting business in the convention.

A rule of the Convention provided that no committee should absent itself from the Convention while in session, consequently the Convention was forced to adjourn to allow the Committee to draw up a form of government and Constitution time in which to prepare its report. From July 11th until August 4th, the sessions of the Convention were very short and generally lasted only a few hours each day. During the latter days the Committee made its report and the Convention sat as a committee of the whole while each part of the proposed plan was read. The plan was amended by debate on the floor since only the preamble and the Declaration of Rights were accepted outright without opposition. From August

[6]Journal of the Convention of the Western Part of the Mississippi Territory, 15.

4th, until August 15th, the Convention sifted carefully each article of the Constitution and only after thorough debate over the integral parts was the Convention satisfied in its search for a stable and lasting form of government.

The Constitution provided that the General Assembly should convene on the first Monday in October, 1817, at Natchez and thereafter on the first Monday in November at such a place as should be designated by law. On September the first and second, elections were held for Governor, lieutenant governor, representatives in Congress and members of the General Assembly. David Holmes was elected Governor of the State without opposition and on November 6th, 1817, he sent the following letter to the Speaker of the House of Representatives of the United States:[1]

Town of Washington,
State of Mississippi,
November 6, 1817.

Sir,

I have the honor to transmit to you a copy of the Constitution of the State of Mississippi, which has been compared with the original roll filed in the office of the secretary of state.

I have the honor to be,
With great respect, Sir,
Your obedient servant,
David Holmes
Governor of the State of
Mississippi.

The Honorable Speaker
of the House of Representative of the United States.

In the meantime Congress on December 8th, passed the Barbour resolution which the Senate had already passed on the third of December and President Monroe signed the act on December 10th, 1817. The passage of this resolution admitted Mississippi to the Union, and Messrs. Leake and Williams were sworn in as Senators on December 11th. The final act in connecting the Federal and State Governments was taken on March 30th, 1818, when the Senate and House of Representatives concurred in extending the laws of the United States to the newly created State.

MAXWELL BRAMLETTE

[1]Letter from David Holmes to the Speaker of the House of Representatives of the United States.

RECENT IMPORTANT DECISIONS

Criminal Law—Nature of Hypothetical Question to be asked an Expert Witness

Defendant was convicted of murder, and appeals. His defense was insanity, and the principle assignment of error concerns the overruling of his objection to hypothetical questions asked by the State of an expert witness, in an attempt to establish his sanity. The questions objected to did not hypothesize certain evidence introduced by defendant and uncontradicted by the State, which tended to prove that there had been cases of insanity in the family of defendant, that he had been pronounced insane by several hospital officials, and that his actions at times had not been those of a sane person. HELD: Undisputed testimony, though produced by the defendant in a criminal case, cannot be ignored in framing a hypothetical question as to the sanity of the defendant. Reversed and remanded. *Cates v. State,* ..... Miss. ....., 157 So. 95 (1934).

It seems to be a general rule of evidence that the party asking a hypothetical question of an expert witness may select any set of facts in evidence on which he desires the opinion of the expert. He may select the facts which support his theory of the case, and get an opinion on them. "The questioner is entitled to the witness' opinion on any combination of facts that he may choose.—The natural conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis."[1] Of course, a question should not be based on a hypothetical state of facts that has not been shown to exist, or which it is not probable that the jury will hold to exist.[2] Some cases have laid down the rule that a hypothetical question need not hypothesize every fact in evidence.[3]

There seems, however, to be some dissension of authority on this question, as a long line of decisions have held that a hypothetical question must hypothesize all material or undisputed facts in evidence.[4]

There seems to be a difference of opinion in Alabama, for *Miller v. Whittington*[5] holds that every fact need not be included in a hypothetical question, while *Alabama Power Co. v. Bruce*[6] holds a hypothetical question must hypothesize all *material* or *undisputed* facts in evidence. Emphasizing the adjectives "material" and "undisputed" may serve to distinguish the cases, as well as the two general rules.

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[1] 1 Wigmore, Evidence (2nd. Ed.) § 682 (a).

[2] Woolner v. Spalding, 65 Miss. 211, 3 So. 583 (1887).

[3] Miller v. Whittington, 202 Ala. 406, 80 So. 499 (1918); Treadwell v. Nickel, 228 Pac. 25, 194 Cal. 243 (1924); Mo. & N. A. R. R. Co. v. Daniels, 98 Ark. 352; 136 S. W. 65 (1911).

[4] Ala. Power Co. v. Bruce, 209 Ala. 423, 96 So. 346 (1923); Crocker's Heirs v. Crocker's Heirs, 156 Ark. 309, 246 S. W. 6 (1922); Bell v. State, ... Ark. ....., 180 S. W. 186 (1911); Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908); People v. Vanderhoof, 71 Mich. 158; 39 N. W. 28 (1888).

[5] 202 Ala. 406, 80 So. 499 (1918).

[6] 209 Ala. 423, 96 So. 346 (1923).

The only Mississippi case found on this point is *Earp v. State*.[7] Defendant was convicted of murder, and testimony was introduced tending to prove him insane. The state asked an expert witness a hypothetical question, assuming the state's theory of the murder, but not assuming any of the facts brought out by the defendant as tending to prove insanity. The court held this to be reversible error.

From a consideration of the authorities, therefore, the logical deduction is that though a hypothetical question need not assume all facts introduced in evidence, yet the party asking the question cannot pick and choose at will from the facts, but must include in them all uncontroverted facts which tend to disprove the theory of the questioner. A question which did not assume such facts would be without value to the jury, as a guide in reaching a decision. "It is error to allow an expert to answer a hypothetical question which excludes from his consideration facts already proved by the testimony upon which the question is based, and which stand uncontroverted, provided a consideration of such facts is essential to the formation of an intelligent opinion concerning the matter."[8] The principle trouble with this rule, however, is the question of what facts are proved. This is, of course, a question for the jury, as stated in the case at bar, and even if a fact is undisputed, the jury need not necessarily believe it merely because of the fact that it is undisputed, if they have reason to believe that the witness was mistaken or lying.

Some courts have held that the form of the hypothetical question to be asked an expert witness is subject to the control of the trial judge. "In a criminal prosecution, the question as to whether a party may propound to expert witnesses hypothetical questions not reciting all the facts proved is to some extent within the discretion of the trial court, which may prevent a particular fact of the testimony of a particular witness being singled out and emphasized, or may exclude facts not within the probable range of the evidence."[9]

"The court must so control the form of the question that there is no abuse of the right to take the opinion, the right being subject to abuse by allowing the opinion to be so given as to mislead the jury by concealing the real significance of the evidence, or by unduly emphasizing certain favorable or unfavorable data."[10]

"A hypothetical question must fairly reflect the evidence, and unless it does so, the resultant opinion evidence is not respondent to the real facts and can have no probative force."[11]

"The trial court should control the form of the hypothetical question so as to require that they sufficiently embrace the facts on which they are based."[12]

"The trial judge should be given a discretion to determine how far the counsel can and must properly limit his questions, and how far the jury may be trusted, with the aid of argument, to discover the conditional nature of the opinion."[13]

In the opinion in this case,[14] the court quotes at length from *People v. Vanderhoof*.[15] In that case, the defendant was charged with the murder of her husband,

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[7]..... Miss. ....., 38 So. 288 (1905).
[8]2 JONES, EVIDENCE (2nd. Ed.) § 1328.
[9]Ince v. State, 77 Ark. 426, 93 S. W. 65 (1906).
[10]Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908).
[11]Taylor v. McClintock, *supra*.
[12]Mo. & N. A. R. R. Co. v. Daniels, 98 Ark. 352, 136 S. W. 651 (1911).
[13]1 WIGMORE, EVIDENCE (2nd. Ed.) § 682 (b).
[14]Written by Ethridge, J., Mississippi Supreme Court.
[15]71 Mich. 158, 39 N. W. 28 (1888).

and it was the contention of the People that the deceased died of poisoning administered by the defendant. In refuting that theory, the defendant offered testimony tending to prove that deceased had been suffering from heart trouble for some time, and that his death resulted from that cause. The People were permitted to ask the opinion of an expert on a hypothetical question regarding the cause of death of the deceased which hypothesized only the immediate circumstances of his death, and did not embody the uncontroverted testimony of the condition of deceased for some time prior to his death. The appellate court held this to be reversible error. Quoting from the opinion in this case: "Where it is sought to show the cause of deceased's death, by medical experts, it is error to allow the prosecution to propound hypothetical questions which do not embrace all of the undisputed facts of the case, or which embrace statements, not facts, deducible from the evidence." The principles involved in that case and the case at bar are analogous.

In the instant case, the question asked is manifestly unjust to the defendant. Insanity is a deep-seated disease, and isolated acts or conduct over a short period of time are not sufficient to form the basis for an opinion as to the condition of the mind of the subject. As stated in the opinion, none of the facts included in the hypothetical question propounded to the witnesses by the state would, without the support of other evidence, have any tendency to prove the insanity of the defendant. But there was a great deal of evidence, covering an extended period of time, introduced by the defendant, and uncontroverted by the State, which was strongly in support of the insanity theory contended for by the defendant. Of course, as stated before, it was within the province of the jury to believe or disbelieve that testimony, and it cannot be regarded as proven conclusively merely because it is uncontradicted, but surely common justice demands that the expert witnesses be permitted to consider that evidence in forming opinions which are bound to have some effect on the jury. In the questions propounded to the witnesses, the State seems to have abused its privilege of obtaining the opinion of the experts on any selection of facts in accord with its theory of the case, and to have exceeded the bounds of reason in the exercise of its privilege of selection. Therefore, the court seems to be imminently correct when it says: "Where the facts are conflicting, the party producing the expert may state the facts in accordance with his theory of them, assuming them to be true for the purpose of the argument. He is not authorized to omit material evidence bearing on the issue and calculated to influence the decision of the issue, but he must state these facts where they are not disputed." Thus it would appear that the majority opinion of the Supreme Court, reversing the conviction of the defendant and remanding the case for a new trial, was correct.

A dissenting opinion[16] uses the following language: "So here the proved facts and factual circumstances of this homicide, as disclosed by this record, are so conclusive, as it seems to me, that the killer comprehended and understood the right and wrong of it, and his consequent responsibility to the law for it, as to render it inescapable that a conviction should follow, experts and any number of experts to the contrary notwithstanding. For that reason I think the verdict of the jury shoud be upheld and the judgment affirmed." The author of the dissenting opinion apparenty fails to take into consideration the fact that the opinion of an expert witness when in conflict with the theory of the defendant is highly prejudicial to the case of the defendant when admitted in evidence. "Where owing to

[16]Written by Griffith, J., Mississippi Supreme Court, Smith, C J. concurring in the dissent.

the insufficient character of the direct evidence, the experts become the witnesses on whose testimony the whole case rests, any error in admitting expert opinion becomes a fatal error."[17] The defendant has the right to have the testimony of an expert witness correctly presented, regardless of how convincing the other evidence may be, as evidence tending to prove a positive fact, the jury being the sole judge of the facts. There can be little doubt but that the answers of the witnesses to the hypothetical questions asked them by the State were contributing factors in the minds of the jurors in reaching a decision.

WILLIAM A. STIGLER

[17]People v. Millard, 53 Mich. 75, 18 N. W. 562 (1884).

MUNICIPAL CORPORATIONS—MAINTENANCE OF STREETS—NEGLIGENCE

Appellee, while walking on the sidewalk of one of the appellant's streets, came to a right angle intersection with another street; when she stepped from the sidewalk into the intersecting street the heel of her shoe went into a crevice causing her to fall and injure her knee. The crevice had been in the street for several weeks. The evidence showed that the width and depth of the crack varied from a half inch to three inches and as to its length from eighteen inches to two feet, that it often filled with dirt, but would wash out during heavy rains. Appellee, plaintiff below sued for and recovered damages. HELD: Reversed. The city owes a duty of ordinary care to keep and maintain its street in a reasonably safe condition for persons using ordinary care and prudence. *City of Greenville v. Laury,* ..... Miss. .....; 159 So. 121 (1935).

The rule advanced in the majority opinion in the instant case seems to limit the municipality's duty to those persons using ordinary care in accordance with the prior Mississippi cases.[1] It would impliedly follow that the city owes no duty of reasonable care to those persons not using ordinary care. It is submitted however, that the city owes the duty to use ordinary care to keep its streets in a reasonably safe condition to the general public—not merely to those persons using ordinary care. The majority opinion does not clearly show which party in the case was negligent or which one's negligence was the proximate cause of the injury. It is true that the municipality should not be held liable in a case in which it is not negligent but at the same time the injured party was negligent, for in such an instance the negligence of the injured party would be the sole cause of the injury. But even when both parties are negligent, the fact that the injured party was guilty of contributory negligence will not bar a recovery but only goes to the dimunition of the damages in proportion to the amount of the contributory negligence.

Municipalities in exercising their statutory duty and prerogative of maintenance and repair of its streets are exercising a corporate function.[2] They are not held to be insurers of the safety of their streets;[3] a user may assume that a street is reasonable safe;[4] the burden of proof as to negligence of the municipality is on the person claiming damages.[5]

[1]McComb v. Hayman, 124 Miss. 525, 87 So. 11 (1921); Higginbottom v. Burnsville, 113 Miss. 219, 74 So. 133 (1917); Meridan v. Crook, 109 Miss. 700, 69 So. 182 (1915); Vicksburg v. Hennessy, 54 Miss. 391 (1877); Nesbitt v. Greenville, 69 Miss. 22, 10 So. 452 (1891).
[2]Warren v. Booneville, 151 Miss. 457, 118 So. 290 (1928).
[3]Higginbottom v. Burnsville, 113 Miss. 219, 74 So. 133 (1917).
[4]Vicksburg v. Harralson, 136 Miss. 872, 101 So. 713 (1924).
[5]Meridan v. Crook, 109 Miss. 700, 69 So. 182 (1915).

The court apparently overlooked the Mississippi statute involving contributory negligence. The statute[6] provides that: "In all actions hereafter brought for personal injuries . . . the fact that the person injured . . . may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured . . ." Although at common law contributory negligence was a complete defense, it is no longer an absolute defense in a suit for damages for personal injuries, but goes only to the amount of the damages.[7]

The specially concurring opinion of Justice Anderson, who agreed with the result reached in the instant case but who disagreed with the controlling principle seems to state the correct principles. He observed that the common law rule no longer applies in this state; that "it is no longer reasonable care for reasonable care, but such care on the part of the defendant as will reasonably prevent injury to others, whether or not they are using ordinary care for their own safety, provided their want of ordinary care is not the sole cause of the injury. The rule therefore now is reasonable care to prevent injury to others, regardless of whether they themselves are using reasonable care for their own safety, provided their negligence is not the proximate cause of the injury. If it is, there is no liability, even though the defendant has failed in its duty. If the plaintiff is injured solely through his own lack of care, that means, of course, that want of care by the defendant had nothing to do with the injury; and did not contribute to it."

The pivotal question is whose negligence is the proximate cause of the injury, for it has been shown that contributory negligence is not a complete defense in this state.[8] Proximate cause is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which injury would not have occured.[9] In the case of *Alabama & V. Ry. Co. et al v. Graham,*[10] Justice Cook used the following language:

> "That the measure of . . . a municipality's duty in maintaining its streets, is to use ordinary care to keep them in a reasonably safe condition . . . was held in McComb v. Hayman (124 Miss. 525; 87 So. 11) but it does not necessarily follow that there can be no liability to a person who was not exercising due care."

Where a city was negligent with respect to animals in a zoo, the court held that the fact that the person injured by an animal was guilty of contributory negligence would not defeat a right of action under the code providing for diminishing of damages in such cases in proportion to the negligence of the plaintiff and the defendant.[11]

The city owes the duty to use ordinary care to keep its streets in a reasonably safe condition to the general public—not merely to those persons using ordinary care. To limit the municipality's duty of care to only those persons using ordinary care will when taken to its logical conclusion relieve the municipality even though it has been negligent, when the other person has been guilty of only the slightest negligence and although his negligence was not the proximate cause of the

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[6]Mississippi Code Ann. 1930, § 511.

[7]Miss. Cent. R. Co. v. Lott, 118 Miss. 816, 80 So. 277 (1918); Cumberland Telephone & Telegraph Co. v. Cosnahan et. al., 105 Miss. 615, 62 So. 824 (1913).

[8]Note 7, *supra.*

[9]Ill. Cent. R. Co. v. Wright, 135 Miss. 435, 100 So. 1 (1924).

[10]157 So. 241 (1934).

[11]Byrnes v. City of Jackson, 140 Miss. 456, 105 So. 861 (1925).

injury. Does not this conception override the contributory negligence statute? There is no justifiable reason for the majority opinion to tack onto the rule the words "for persons using ordinary care"; a number of jurisdictions hold, and it is believed the correct view, that the municipality owes a duty to exercise reasonable care to keep its streets in a reasonably safe condition for travel, not for those persons alone who are exercising due care, but for the public.[12]

Does the court intend to make an exception to the general rule in Mississippi as to negligence in cases involving municipal corporations? In this state the plaintiff in negligence cases is required in order to make out a case only to establish the negligence of the defendant. The burden is then upon the defendant to show the contributory negligence of the plaintiff as the proximate cause of the injury if the defendant is to prevail and defeat the action.[13] Does the rule stated by the majority opinion have the effect to vary this rule and place upon the plaintiff the burden of showing his own due care and also the negligence of the defendant? Such a deduction is logical in view of the principle as stated in the instant case that a municipality owes a duty of care to persons exercising ordinary care, thus implying that no duty is owed to persons not exercising ordinary care. If the court intends to be understood as adopting this view, is not the burden under such theory upon the plaintiff to show the negligence of the defendant and also his (plaintiff's) own due care? Is not this an unwarranted restriction upon our contributory negligence statute and contrary to the Mississippi rule in negligence cases which requires the plaintiff only to establish the negligence of the defendant in order to make out a prima facie case?

GEORGE T. MCCLINTOCK

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[12]Town of Mooresville v. Spoon, 69 Ind. App. 565, 118 N. E. 686 (1918); Allen v. City of Ft. Dodge, 183 Iowa 818, 167 N. W. 577 (1918); City of Lebanon v. Graves, 178 Ky. 749, 199 S. W. 1064, L. R. A. 1918B, 1016; Francis v. City of West Plains, 203 Mo. App. 249, 216 S. W. 808 (1919); Kuhn v. Village of East Syracuse, 209 App. Div. 816; 204 N. Y. S. 697 (1924); Davis v. Borough of Shenandoah, 273 Pa. 501, 117 Atl. 207 (1922); Elkon v. City of Chelsia, 223 Mass. 213, 111 N. E. 866 (1916); It is the duty of a city to keep and maintain its streets in a reasonably safe condition for the traveling public. City of Bessemer v. Barrett, 212 Ala. 202, 102 So. 23; See also City of Ft. Worth v. Nelson, 220 S. W. 123; City of Lakeland v. Beck, 285 F. 375 (Fla.) (1922); City of Phoenix v. Clem, 28 Ariz. 315, 237 Pac. 168 (1925).

[13]Contributory negligence is an affirmative defense and the burden is upon the defendant to prove it. Miss. Cent. R. Co. v. Hardy, 88 Miss. 732, 41 So. 505 (1906); Gulf & S. I. R. Co. v. Saucier, 139 Miss. 497, 104 So. 180 (1925).

BOOK REVIEWS

DIVORCE AND SEPARATION IN MISSISSIPPI. By A. B. Amis, Sr., Meridian Mississippi. Dement Printing Co., 1935, pp. 508.

"Slip-Knot (!) the marital knot (! or ?)" (spelled and punctuated as one chooses) may well be taken as the theme note of Judge Amis' excellent, self-styled "Brief." The author warns the reader that "no book . . . can ever be greater" than its author, and that it "inevitably reflects his view-point of life . . . even as water that flows from a spring is impregnated with the substances through which it has percolated."

The author then obligingly brings the substrata of his view-point very close to the surface and opens his book with an able historical, philosophical and physiological argument in favor of life-long marriages. It is again illustrated in his chapters on Cruel and Inhuman Treatment, which as a ground for divorce, he decries as being generally misunderstood and like charity, as covering a multitude of marital sins.

The author has performed a distinct service in grouping for discussion under two separate subjects,—annullment and divorce,—the various "grounds," which, by our legislators, have been treated only under the one chapter of Divorce in the Code. The differences, both as to jurisprudence and procedure are carefully treated.

There are sections of the work devoted to each of the "grounds of divorce" enumerated in the Code, as well as sections dealing with all the allied topics, such as alimony, contempt, maintenance, children, defenses, ancillary and collateral proceedings and a detailed comparison of foreign divorce laws and the status and effect of foreign divorces in Mississippi.

Interspersed throughout the work at the end of each sub-heading, are blank pages for individual memoranda of the reader, for additional annotations, etc. It seems that the author has, at the appropriate places, commented on practically every divorce case decided by the Mississippi Courts, and wherever that tribunal has failed to touch upon the text, there are numerous citations to such standard works as *Corpus Juris* and *Ruling Case Law* to point the way to the practitioner. The author has omitted a table of cases, because of his opinion that such tables are useless in these days of numerous digests and annotations. However, it is submitted that that reason would be stronger were our Mississippi Digests and annotations more numerous and helpful than those with which the writer is familiar. Large print, a thorough subject analysis at the beginning of each chapter and a full 31 page index are other features which make the use of the work convenient and easy.

To the practitioner, the author's work will certainly be a great aid and comfort in enlightening him as to the multitude of questions and procedure in divorce, which are obtainable usually, only by word of mouth from one who has had the author's years of practice as a Chancellor and student of the law.

That the influence of the work in shaping the future law of Mississippi in its scope, will be large and therefore indispensable in its field, is demonstrated by the fact that already in its infancy it has been frequently quoted and cited by the Supreme Court of Mississippi.

Having read the work, one intuitively feels the soundness of the substrata of its source.

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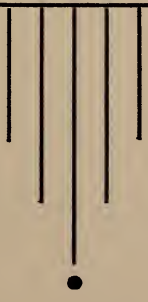

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